Supreme Court, U.S.
FILED

011090 JAN 18 2002

OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

ROBERT F. CARLSON AND JOHN MORACK,

Petitioners,

v.

UNITED ACADEMICS—AAUP/AFT, AFL-CIO,

Respondent.

On Petition for Writ of *Certiorari* to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF *CERTIORARI*

W. JAMES YOUNG*
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

ATTORNEY FOR PETITIONERS
**Counsel of Record*

January 2002

130 pp

QUESTIONS PRESENTED

I. Would class certification "serve no purpose" in a civil rights suit when a district court has awarded declaratory and injunctive relief, and nominal damages, to the named plaintiffs, but not to the members of the class plaintiffs seek to represent?

II. Is a claim for declaratory and injunctive relief for admittedly illegal conduct mooted by post-complaint measures of a defendant that remains free to return to its old ways?

III. Does a union satisfy "the constitutional requirements for the ... collection of agency fees," *Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 310 (1986), when its procedure discriminates between those who accept the union's reduced-fee calculation and those who challenge the calculation before an "impartial decisionmaker," by: (1) withholding from the latter the immediate "advanced rebate" granted to the former; and (2) permitting the "impartial decisionmaker" to increase the amount of the fee?

PARTIES TO THE PROCEEDINGS BELOW

There were no parties to the proceedings in the court whose judgment is sought to be reviewed other than the parties named in the caption.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

I. The Facts 3

II. Proceedings Below 5

REASONS FOR GRANTING THE WRIT 11

I. THE IMPORTANT QUESTION AS TO CLASS CERTIFICATION DIRECTLY ADDRESSES THE POWER OF INDIVIDUALS TO VINDICATE THE RIGHTS OF SIMILARLY-SITUATED EMPLOYEES AGAINST STATE-SANCTIONED IMPOSITION OF UNLAWFUL TERMS AND CONDITIONS OF EMPLOYMENT 11

A. The Conflict with This Court's Mootness Decisions 12

TABLE OF CONTENTS — CONTINUED

Page

B. The Conflict Among the Circuits 14

II. THE DENIAL OF RELIEF BASED ON REVERSIBLE POST-COMPLAINT REMEDIAL MEASURES VIOLATES THIS COURT'S JURISPRUDENCE 16

A. The Conflict with This Court's Decisions 18

B. The Conflict Among the Circuits 19

III. THE REQUIREMENT THAT EMPLOYEES SURRENDER THEIR RIGHT TO AN IMMEDIATE ADVANCE REDUCTION AND RISK AN INCREASE IN THE FEE CALCULATION CONFLICT WITH JURISPRUDENCE BARRING IMPOSITION OF UNCONSTITUTIONAL CONDITIONS 23

A. The Conflict with This Court's Decisions 24

B. The Conflict Among the Circuits 26

CONCLUSION 28

APPENDICES

A. Decision of the United States Court of Appeals for the Ninth Circuit (6 September 2001), **reported at 265 F.3d 778 (9th Cir. 2001)** 1a

TABLE OF CONTENTS -- CONTINUED

Page

B. Order Denying Motion for Class Certification in the United States District Court for the District of Alaska (16 November 1998) 17a

C. Order Granting in Part Motion for Summary Judgment in the United States District Court for the District of Alaska (16 February 1999) ... 28a

D. Order Granting in Part and Denying in Part Plaintiffs' Motion for Summary Judgment and Granting Defendant's Motion for Summary Judgment in the United States District Court for the District of Alaska (10 February 2000) 40a

E. Final Judgment of the United States District Court for the District of Alaska (30 March 2000) 75a

F. Order on Petition for Rehearing and Petition for Rehearing *En Banc* of the United States Court of Appeals for the Ninth Circuit (22 October 2001) 79a

G. United States Constitution, First Amendment .. 80a

H. United States Constitution, Fourteenth Amendment 81a

TABLE OF CONTENTS — CONTINUED

Page

I. Civil Rights Act of 1871, 42 U.S.C. § 1983 (West Westlaw Electronic Update 2001) 82a

J. ALASKA CODE ANN. § 23.40.250 ..... 83a

K. ALASKA CODE ANN. § 23.40.080 ..... 84a

L. ALASKA CODE ANN. § 23.40.110 ..... 85a

TABLE OF AUTHORITIES

Page

Cases

Abood v. Detroit Bd. of Educ.,
431 U.S. 209 (1977) 24, 25

Adarand Constructors, Inc. v. Slater,
528 U.S. 216 (2000) 10, 18

Afro-American Publ'g Co. v. Jaffe,
366 F.2d 649 (D.C. CIR. 1966) 15

Amato v. City of Saratoga Springs,
170 F.3d 311 (2D CIR. 1999) 15

Board of Regents of the Univ. of Wisconsin v. Southworth,
528 U.S. 804 (2000) 24

Bowman v. Loperena,
311 U.S. 262 (1940) 2

Burson v. Freeman,
504 U.S. 191 (1992) 23

Carey v. Piphus,
435 U.S. 247 (1978) 13

Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. District of Columbia,
972 F.2d 365 (D.C. CIR. 1992) 22

TABLE OF AUTHORITIES — CONTINUED

Page

City of Mesquite v. Aladdin's Castle, Inc.,
455 U.S. 283 (1982) 18, 19

City of Riverside v. McLaughlin,
500 U.S. 44 (1991) 11

Cleaver v. Wilcox,
499 F.2d 940 (9TH CIR. 1974) 14

Committee for First Amendment v. Campbell,
962 F.2d 1517 (10TH CIR. 1992) 16

Consolidated Edison Co. v. Public Serv. Comm'n,
447 U.S. 530 (1980) 23

County of Los Angeles v. Davis,
440 U.S. 625 (1979) 18, 21

Damiano v. Matish,
830 F.2d 1363 (6TH CIR. 1987) 26, 27

Dean v. TWA, Inc.,
924 F.2d 805 (9TH CIR. 1991) 12

Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper,
445 U.S. 326 (1980) 11, 12

DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.,
196 F.3d 958 (9TH CIR. 1999),
cert. denied, 529 U.S. 1067 (2000) 21

TABLE OF AUTHORITIES — CONTINUED

Page

Doe v. Delie,
257 F.3d 309 (3D CIR. 2001) 22

Duja Va of Nashville, Inc. v. Nashville,
274 F.3d 377 (6TH CIR. 2001) 22

Elrod v. Burns,
427 U.S. 347 (1976) 26

Employers Ins. of Wausau v. FDIC,
112 F.R.D. 52 (E.D. TENN. 1986) 12

Familias Unidas v. Briscoe,
619 F.2d 391 (5TH CIR. 1980) 16

Farrar v. Hobby,
506 U.S. 103 (1992) 13

Florida Right to Life, Inc. v. Lamar,
273 F.3d 1318 (11TH CIR. 2001) 22

Friends of the Earth v. Laidlaw Envtl. Servs., Inc.,
528 U.S. 167 (2000) 18, 22

FTC v. Affordable Media,
179 F.3d 1228 (9TH CIR. 1999) 20

Fyfe v. Curlee,
902 F.2d 401 (5TH CIR.),
cert. denied, 498 U.S. 940 (1990) 16

TABLE OF AUTHORITIES — CONTINUED

Page

Gibson v. Florida Bar,
499 U.S. 1305 (1991), *cert. dismissed as improvidently granted*, 502 U.S. 104 (1991) 24

Gibson v. Florida Bar,
906 F.2d 624 (11TH CIR. 1991) 24

Gilpin v. AFSCME,
875 F.2d 1310 (7TH CIR. 1989) 7

Grandson v. University of Minnesota,
272 F.3d 568 (8TH CIR. 2001) 22

Grunwald v. San Bernardino Sch. Dist.,
994 F.2d 1370 (9TH CIR. 1993) 9, 27

Hawkins v. Comparet-Cassani,
251 F.3d 1230 (9TH CIR. 2001) 21

Kidwell v. Transportation Communications Int'l Union,
731 F. Supp. 192 (D. MD. 1990) 27

Laramie v. County of Santa Clara,
784 F. Supp. 1492 (N.D. CAL. 1992) 25, 27

Leer v. Washington Education Ass'n,
172 F.R.D. 439 (W.D. WASH. 1997) 7

Lindquist v. Idaho State Bd. of Corrections,
776 F.2d 851 (9TH CIR. 1985) 20

TABLE OF AUTHORITIES — CONTINUED

Page

Liu v. INS,
— F.3d —, 2001 WL 1657298 (D.C. CIR. 2001) ... 22

McGraw-Edison Co. v. Preformed Line Prod. Co.,
362 F.2d 339 (9TH CIR. 1966) 14

Morrison v. Hall,
261 F.3d 896 (9TH CIR. 2001) 22

Norman-Bloodsaw v. Lawrence Berkeley Lab.,
135 F.3d 1260 (9TH CIR. 1998) 20, 21

Norwood v. Bain,
166 F.3d 243 (4TH CIR.),
cert. denied, 527 U.S. 1005 (1999) 15

Powell v. McCormack,
395 U.S. 486 (1969) 19

Public Utilities Comm'n of California v.
Federal Energy Regulatory Comm'n,
100 F.3d 1451 (9TH CIR. 1996) 20

Riley v. National Fed'n of the Blind,
487 U.S. 781 (1988) 23

Rosenberger v. Rector & Visitors of the Univ. of Virginia,
515 U.S. 819 (1995) 23

TABLE OF AUTHORITIES — CONTINUED

Page

Sefick v. Gardner,
164 F.3d 370 (7TH CIR. 1998),
cert. denied, 527 U.S. 1035 (1999) 21

Smith v. University of Washington, Law Sch.,
233 F.3d 1188 (9TH CIR. 2000) 21

Star v. West,
237 F.3d 1036 (9TH CIR. 2001) 21

Steffel v. Thompson,
415 U.S. 452 (1974) 14

Teachers Local No. 1 v. Hudson,
475 U.S. 292 (1986) ..... *passim*

Tierney v. City of Toledo ("Tierney II"),
824 F.2d 1497 (6TH CIR. 1987) 25, 26

Tober v. Charnita, Inc.,
58 F.R.D. 74 (M.D. PA. 1973) 12

Torcaso v. Watkins,
367 U.S. 488 (1961) 26

United Airlines, Inc. v. McDonald,
432 U.S. 385 (1977) 11

U.S. Parole Comm'n v. Geraghty,
445 U.S. 388 (1980) 11

TABLE OF AUTHORITIES — CONTINUED

Page

United States v. Concentrated Phosphate Export Ass'n,
393 U.S. 199 (1968) 10, 18

United States v. Generix Drug Corp.,
461 U.S. 453 (1983) 18

United States v. W.T. Grant Co.,
345 U.S. 629 (1953) 18

Weaver v. University of Cincinnati,
942 F.2d 1039 (6TH CIR. 1987) 27

Weinberg v. Whatcom County,
241 F.3d 746 (9TH CIR. 2000) 19

Widmar v. Vincent,
454 U.S. 263 (1981) 23

Wilks v. Reyes,
5 F.3d 412 (9TH CIR. 1993) 19

Constitutions, Statutes, and Rules

United States Constitution,
art. III 11
amend. I ..... *passim*
amend. V 24, 25
amend. XIV 2, 24

TABLE OF AUTHORITIES — CONTINUED

Page

28 U.S.C. § 1254(1) (West 1993) 2

Declaratory Judgment Act,
28 U.S.C. § 2201 *et seq.* 14

Civil Rights Act of 1871, 42 U.S.C. § 1983
(West Westlaw Electronic Update 2001) 2, 3

Supreme Court Rule 13.1 2

Federal Rules of Civil Procedure
Rule 23(a)(3) 6
Rule 23(a)(4) 6
Rule 23(b)(1) 12
Rule 23(b)(2) 12
Rule 23(b)(3) 12

Alaska's Public Employment Relations Act,
ALASKA CODE ANN. § 23.40.070 *et seq.* 2

Other Authorities

Herbert Newberg, 1 *Newberg on Class Actions*
§ 4.20 (3d ed. 1992) 12

James Wm. Moore, 5 *Moore's Federal Practice*
§ 23.40[2] (Matthew Bender, 3d ed. 2001) 12

IN THE
Supreme Court of the United States
OCTOBER TERM 2001

No. 01-____

ROBERT F. CARLSON AND JOHN MORACK,

Petitioners,

v.

UNITED ACADEMICS—AAUP/AFT, AFL-CIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF *CERTIORARI*

Petitioners Robert F. Carlson and John Morack respectfully pray that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered on 6 September 2001.

OPINIONS BELOW

The panel opinion sought to be reviewed (Appendix ("App.") A at 1a) is reported at 265 F.3d 778. The judgment of

the United States District Court for the District of Alaska (App. E at 75a) is unreported. The opinion and order of the United States District Court for the District of Alaska on Petitioners' initial Motion for Summary Judgment (App. C at 28a) is unreported. The opinion and order of the United States District Court for the District of Alaska on Petitioners' and Respondent's Cross-Motions for Summary Judgment (App. D at 40a) is unreported. The opinion and order of the United States District Court for the District of Alaska denying Petitioners' Motion for Class Certification (App. B at 17a) is unreported. The Court of Appeals' unreported order denying the Petition for Rehearing; Petition for Rehearing *En Banc* appears in App. F at 79a.

JURISDICTION

The Court of Appeals entered its judgment on 6 September 2001. Petitioners' timely Petition for Rehearing; Petition for Rehearing *En Banc* was denied on 22 October 2001 (App. F at 79a). The time for petitioning for a writ of *certiorari* runs from the latter date. *Bowman v. Loperena*, 311 U.S. 262, 266 (1940). This petition is timely under Supreme Court Rule 13.1. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (West 1993).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments of the United States Constitution, Title I of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (West Westlaw Electronic Update 2001), and portions of Alaska's Public Employment Relations

Act, ALASKA CODE ANN. § 23.40.070 *et seq.* Their pertinent text is set out in Appendices G-L at 80a-85a.

STATEMENT OF THE CASE

This case involves: (1) litigants' ability to obtain relief for violations of their constitutional rights and those of a class of similarly-situated individuals; and (2) public employees' ability to obtain procedural protections that do not discourage, or impose undue restrictions upon, the exercise of their constitutional rights, when subject to a forced-unionism scheme as a condition of continued public employment.

This is a civil rights action pursuant to 42 U.S.C. § 1983 (West Westlaw Electronic Update 2001), seeking declaratory, injunctive, and other relief to prevent and redress the deprivation under color of Alaska law of Petitioners' rights, privileges, and immunities under the United States Constitution.

I. The Facts.

Petitioners Robert F. Carlson and John Morack ("the professors") are professors employed by the University of Alaska at its Fairbanks campus ("the University"), in a bargaining unit of University teaching and research faculty. Pursuant to Alaska's Public Employment Relations Act ("PERA"), ALASKA STAT. § 23.40.070 *et seq.*, Respondent United Academics—AAUP/AFT, AFL-CIO ("United Academics") is the bargaining unit's monopoly bargaining representative. The professors are not members of United Academics.

In early 1998, the University entered into a collective bargaining agreement ("CBA") with United Academics requiring

that all University professors either maintain membership in United Academics or pay an "agency fee" as a condition of continued employment. As members of the University bargaining unit, Petitioners are subject to this forced-unionism clause.

Pursuant to the CBA, in March 1998, United Academics sent to the professors, and to nearly 300 nonunion University faculty members, individual copies of an identical letter addressed to each "Bargaining Unit Member." App. B at 18a. The letter demanded that each professor tender to United Academics "1.25% (.0125) of your bi-weekly salary with a $720 cap per calendar year," and further stated that:

> As a condition of your employment and continuing employment, you are required to provide the University with written authorization to deduct [agency] fees from your paycheck (or make an alternate arrangement for their direct payment to United Academics). The payment of the fees is not an option; it is mandatory so long as you work at the University of Alaska and are represented by United Academics.

App. A at 2a-3a; 265 F.3d at 780.

In April 1998, when the professors (and others) failed or refused to respond to this demand, United Academics sent to them *via* certified mail a letter which described itself as "your second, and final notice to send the agency fee form or make an alternative arrangement to pay your fees." App. A at 3a; 265 F.3d at 781. The letter stated that, "If the [dues checkoff authorization] form is not received by May 1, the next correspondence you will receive will be a letter informing you that United Academics has requested that the University terminate your employment per Article 4 of the Collective Bargaining Agree-

ment." App. A at 3a; 265 F.3d at 781.[1] Shortly after receiving the second demand, the professors filed their class-action lawsuit.

During the suit's pendency, United Academics twice again demanded that all professors pay agency fees. The first post-filing demand was sent to the professors and all class members in October 1998. Record ("R.") 40, ¶ 32 & Exhibits D(1)-D(11). Shortly thereafter, the professors filed their Motion for Summary Judgment, R. 23, which identified several constitutional deficiencies in this new notice and its procedures. In response, United Academics sent a second post-filing demand dated 1 December 1998. R. 40, ¶ 33 & Exhibits E(1)-E(5).

II. Proceedings Below.

The professors filed their class-action Complaint against United Academics on 5 May 1998. They sought declaratory and injunctive relief, equitable restitution, nominal, punitive, and compensatory damages, and attorneys' fees and costs for United Academics' violations and/or threatened violations of their constitutional rights. R. 1: Complaint. They alleged that United Academics was attempting to enforce its forced-unionism scheme in violation of *Teachers Local No. 1 v. Hudson*, 475 U.S. 292 (1986).

The professors sought preliminary injunctive relief to prevent United Academics from seeking their discharge, and that of all

---

[1] Approximately 90-100 professors responded by joining the union and authorizing union dues deductions. R. 14, Exhibit A. Approximately 121 other professors responded by authorizing union dues deductions from their wages (which were deducted), but did not join the union. R. 14: Exhibit B. Approximately 68 professors did not respond at all. *Id.*

others who refused to accede to United Academics' demands for payment of union dues, and to stop the deduction of dues from those professors who had, in response to United Academics' illegal demands and threats, already authorized the deduction of union dues. R. 4: Plaintiffs' Motion for a Temporary Restraining Order and/or a Preliminary Injunction. At hearing on 26 May 1998, in which the District Court denied the motion, United Academics represented that it would not seek the discharge of any professor during the pendency of the litigation. R. 13: Transcript of Proceedings.

United Academics filed its Answer, R. 9, and on 3 August 1998, the professors filed their motion for certification, R. 14, of a class of:

> all faculty of the University of Alaska within the relevant bargaining unit who are: (1) represented exclusively for purposes of collective bargaining by Defendant United Academics; and (2) who are nonmembers of United Academics, or were nonmembers at any time when "agency fees" were demanded of and/or collected from nonmembers.

R. 1: Complaint, ¶ 11. United Academics opposed the motion. R. 17. Focusing upon the requirements of Rule 23(a)(3) and (4), FED. R. CIV. P., the Court denied the Motion for Class Certification on 16 November 1998, ruling that "Plaintiffs have not sufficiently demonstrated that their claims are typical of the claims of the putative class, or that they will fairly and adequately protect the interests of the class. This problem is most poignantly exposed in Plaintiffs' request for punitive damages." App. F at 25a. The District Court went on to opine that:

> Plaintiffs' demand for equitable restitution and punitive damages gives rise to precisely the sort of conflict of

> interest anticipated in *Gilpin [v. AFSCME*, 875 F.2d 1310 (7TH CIR. 1989)], and assiduously avoided in *Leer [v. Washington Education Association*, 172 F.R.D. 439, 444-47 (W.D. WASH. 1997)].

Id. at 26a. However, nowhere in its decision denying class certification did the District Court cite a scintilla of relevant evidence that any actual conflict exists beyond its academic musings (and those of the decisions upon which it relies) about absent class members. *Id.* at 22a-27a.

On 27 October 1998, the professors filed their initial summary judgment motion. R. 23. While addressing the United Academics' initial demands, the professors also attacked a demand for payment of agency fees it promulgated after the Complaint's filing. United Academics opposed. R. 32. On 16 February 1999, the District Court granted the Motion in part and denied it in part. App. C at 38a-39a. Finding that United Academics' initial demands "clearly offended the notice and procedural safeguards mandated by *Hudson*," *id.* at 33a, the District Court awarded the professors declaratory relief and nominal damages, but declined to enter permanent injunctive relief. *Id.* at 38a-39a.

United Academics' post-filing demands were considered by the District Court after the professors filed a Supplemental Complaint, R. 40, and a renewed Motion for Summary Judgment. R. 41. The Court took this motion under submission for some months. United Academics then filed a Motion for Partial Summary Judgment. R. 57. Shortly thereafter, the Court disposed of the pending motions, granting in part and denying in part the professors' motion, while granting United Academics' motion, App. D at 68a-73a, and entering judgment. App. E at 76a-78a.

Reaffirming its conclusions regarding United Academics' initial demands, the District Court found that the union's post-filing demands also failed to comply with *Hudson*'s requirements in several substantial ways. The October 1998 demand, R. 40, Exhibits D(1)-D(11), failed to provide adequate affiliate disclosure such that "United Academics admitted [that it] was both insufficient and incomplete." App. D at 47a-48a. Additionally, even taking into account the supplementation made in a December 1998 demand, R. 40, Exhibits E(1)-E(5), the District Court found that United Academics failed to comply with *Hudson*'s requirements because of its: (1) promises of future violations, App. D at 60a-62a; and (2) treatment of nonchargeable political and ideological expenditures as chargeable. *Id.* at 62a-66a. However, the District Court refused to find that two other elements of United Academics' procedures violated *Hudson*'s requirements: (1) its discrimination between individuals who merely object to the payment of full union dues, and receive an immediate rebate ("objectors"), and individuals who both object to the payment of fees equal to full union dues **and** challenge the union's fee calculation before an impartial decisionmaker ("challengers") (who did not receive any immediate rebate), *id.* at 51a-57a; and (2) the element of United Academics' procedures permitting the impartial decisionmaker to increase the amount of the fee. *Id.* at 57a-59a. The District Court also dismissed the professors' claims for punitive damages and injunctive relief. *Id.* at 67a-73a.

On competing motions for entry of judgment, final judgment was entered on 30 March 2000. App. E at 75a-78a. ***Inter alia***, the District Court held that, as applied, the forced-unionism clause requires all University faculty, as a condition of continued University employment, either to join United Academics, or to pay agency fees to United Academics, without providing all of the

procedural and substantive protections required by *Hudson*. App. E at 76a, ¶ 2.

The employees timely appealed, R. 73, seeking, *inter alia*, reversal of the District Court's: (1) speculations about unproven class conflicts, App. B at 24a-27a; (2) denial of relief for deficiencies remaining in United Academics' most recent notice and procedure, App. D at 72a-74a; and (3) determination that certain elements of United Academics' procedure were constitutionally permissible. As to the last, they attacked the District Court's rulings that challengers could be denied the immediate advance reduction provided to employees who did not invoke the union's "impartial decisionmaker" process under *Hudson*, and that the "impartial decisionmaker" could lawfully increase the amount of the challengers' fee. App. D at 50a-58a.

As to the issue of class certification, the Court of Appeals' panel did not address the typicality of the professors' claims, or the adequacy of their representation. Rather, the panel simply determined that "Because we affirm the district court judgment for the Union on the merits, class certification would serve no purpose." App. A at 16a; 265 F.3d at 787.

As to the adequacy of a procedure denying immediate advance reductions to challenging employees—while providing them to non-challenging nonmembers—and threatening a higher chargeable fee calculation before the impartial decisionmaker, the Court of Appeals' panel affirmed the District Court's rulings. App. A at 8a-13a; 265 F.3d at 783-85. The panel declared that the discrimination between objectors and challengers was legitimate under a prior Ninth Circuit decision. App. A at 11a-12a; 265 F.3d at 784-85, citing *Grunwald v. San Bernardino Sch. Dist.*, 994 F.2d 1370, 1374, 1377 (9TH CIR. 1993).

Finally, as to relief, the Court of Appeals' panel affirmed the District Court's denial of permanent injunctive relief as to deficiencies regarding the third notice issued by the union in October 1998. The panel recognized that:

> as a general rule "[v]oluntary cessation of challenged conduct moots a case ... only if it is '*absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 ... (2000) (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)).

App. A at 14a (original emphasis). Nevertheless, the panel sustained the District Court, opining that "We do not believe United Academics would now attempt to revert to the deficient notice format and subject itself to future litigation that it would clearly lose. Under these circumstances, we hold that the conceded defect was cured, and therefore mooted, by the Union's actions ...." App. A at 13a-15a; 265 F.3d at 786-87 (other citations omitted).

The professors' timely Petition for Rehearing and Suggestion of Rehearing *En Banc* was denied on 22 October 2001. App. F at 79a.

REASONS FOR GRANTING THE WRIT

I. THE IMPORTANT QUESTION AS TO CLASS CERTIFICATION DIRECTLY ADDRESSES THE POWER OF INDIVIDUALS TO VINDICATE THE RIGHTS OF SIMILARLY-SITUATED EMPLOYEES AGAINST STATE-SANCTIONED IMPOSITION OF UNLAWFUL TERMS AND CONDITIONS OF EMPLOYMENT.

At first blush, the first issue presented appears to be a routine mootness question in the context of class certification, an issue addressed many times by this Court. *See City of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991), *and cases cited therein*; *Deposit Guaranty Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 332-34 (1980); *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980); *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977). In these cases, among many others, this Court has reaffirmed the requirement that Article III of the Constitution requires that the federal courts consider only live "cases or controversies."

However, the mootness issue in this case is **not** routine. So far as the professors can tell, no court has ever declared absent class members' claims for relief moot when the named plaintiffs have obtained relief for themselves and have had a partially favorable judgment entered in their favor.

The panel premised its refusal to consider the appeal from the denial of class certification upon the erroneous notion that the District Court had entered a "judgment for the Union on the merits," App. A at 16a; 265 F.3d at 787, ignoring the partially favorable judgment entered for the professors. R. 72. Thus, contrary to the Ninth Circuit's conclusion, class certification would serve a purpose: award to the absent class members of the declaratory and injunctive relief and nominal damages awarded

to the professors. It would also serve the important *res judicata* effects of the favorable judgment barring collection suits by the union against those class members who paid no dues while the union's procedure and notices were constitutionally inadequate. *See, e.g., Dean v. TWA, Inc.*, 924 F.2d 805, 809 (9TH CIR. 1991) (nonmembers subject to constitutionally-inadequate demand for fees may withhold payments); *see also* Rule 23(b)(1) and (2), FED. R. CIV. P.[2] Consequently, in addition to leaving United Academics free to return to its old ways of making illegal agency fee demands in the absence of compliance with "the constitutional requirements for the ... collection of agency fees," *Hudson*, 475 U.S. at 310, the absent class members have been denied the real substantive relief already won by the professors for what are indisputably violations of their constitutional rights already committed by United Academics.

A. The Conflict with This Court's Mootness Decisions.

This Court long ago resolved the question of whether entry of judgment in a litigant's favor (and/or its opponent's tender of the relief requested) moots its private case or controversy or serves to bar appeal from the denial of class certification, holding that it does not. *Roper*, 445 U.S. at 340.

---

[2] If any action qualifies under Rule 23(b)(1) and/or (b)(2), as well as (b)(3), then it should be certified under (b)(1) and/or (b)(2) to take advantage of their superior *res judicata* effect and to eliminate the procedural complications of (b)(3) which serve no useful purposes under (b)(1) and (b)(2). *Employers Insurance of Wausau v. FDIC*, 112 F.R.D. 52 (E.D. TENN. 1986); *see also Tober v. Charnita, Inc.*, 58 F.R.D. 74, 79 (M.D. PA. 1973); Herbert Newberg, 1 *Newberg on Class Actions* § 4.20, pp. 4-71-75 (3d ed. 1992); James Wm. Moore, 5 *Moore's Federal Practice* § 23.40[2] (Matthew Bender, 3d ed. 2001).

The District Court entered a judgment declaring that all of United Academics' demands were constitutionally inadequate, App. E at 77a, ¶¶ 1-3 (March and April demands), App. D at 46a (October demand), App. E at 78a, ¶¶ 7-8, and awarded the professors damages for the union's initial illegal demands for payment of full union dues in March and April 1998. App. E at 77a, ¶¶ 1-3. The District Court judgment awarded affirmative injunctive relief to the professors, *id.* at 78a, ¶¶ 7-8, directing that future notices contain certain content, and declared that the union's treatment of certain expenditures as chargeable in its October and December 1998 notices was improper.

The panel's conclusion that "class certification would serve no purpose," App. A at 16a; 265 F.3d at 787, ignores these victories, and virtually writes out important elements of federal law.

This Court long ago recognized the importance of nominal damages, particularly in civil rights cases like this one.

> By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights.

Carey v. Piphus, 435 U.S. 247, 266 (1978). More recently, this Court has declared that "*Carey* obligates a court to award nominal damages when a plaintiff establishes the violation of [a constitutional right] but cannot prove actual injury." *Farrar v. Hobby*, 506 U.S. 103, 112 (1992). The panel's determination contradicts these controlling authorities, relegating such awards

to the status of "serv[ing] no purpose" as to the absent class members. App. A at 16a; 265 F.3d at 787.

Additionally, declaratory relief under the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, is an important element of federal law and its remedial scheme, insofar as its "express purpose" is to "provide a milder alternative to the injunction remedy." *Steffel v. Thompson*, 415 U.S. 452, 467 (1974).

B. The Conflict Among the Circuits.

The lower federal courts, even the Ninth Circuit, have likewise recognized the importance of nominal damages and declaratory relief in the federal remedial scheme. The notion that it would "serve[] no purpose" to provide such relief to the class defies normal constructions of the mootness doctrine.

The Ninth Circuit has itself recognized the *Steffel* principle about the important purposes of the Declaratory Judgment Act. *Cleaver v. Wilcox*, 499 F.2d 940, 944 (9TH CIR. 1974). In discussing the importance of declaratory relief, the Ninth Circuit has recognized elsewhere that its use is to prevent individuals from facing the Hobson's choice of surrendering a claimed right to comply with a statutory scheme, or exercising that claimed right subject to the statutory sanction. The Circuit long ago recognized that "The purpose of the Declaratory Judgment Act is to afford an added remedy to one who is uncertain of his rights and who desires an early adjudication thereof without having to wait until his adversary should decide to bring suit, and to act at his peril in the interim." *McGraw-Edison Co. v. Preformed Line Products Co.*, 362 F.2d 339, 342 (9TH CIR. 1966).

Here, the professors have brought their claim to the federal courts in the hopes of obtaining the full *res judicata* effect of a

favorable declaratory judgment — already won, in part — against United Academics, which remains free to pursue class members for agency fees demanded before this litigation began, and which were declared unlawful only as to the named professors herein. Thus, absent class members must either: (1) remain subject to state-court collection suits for unpaid and unlawfully demanded fees or union demands for discharge from their state employment; or (2) pay fees unlawfully demanded without receiving full remedies completely and irrevocably eradicating the effects of the adjudicated violation.

At least one court of appeals has described the award of such damages as serving "a vindicatory function." *Afro-American Publishing Co. v. Jaffe*, 366 F.2d 649 (D.C. CIR. 1966).[3] Clearly, here, the rights of absent class members have not been "vindicated" by entry of an appropriate damages award benefitting them, as well as the professors.

Likewise, at least four other Circuits have recognized the important role that nominal damages play in the federal remedial scheme. In *Amato v. City of Saratoga Springs*, 170 F.3d 311, 317 (2D CIR. 1999), the Second Circuit explained that "while the monetary value of a nominal damage award must, by definition, be negligible, its value can be of great significance to the litigant and to society." A divided Fourth Circuit also has recognized the requirement that nominal damages be awarded upon adjudication of a constitutional violation. *Norwood v. Bain*, 166 F.3d 243, 245 (4TH CIR.) (*per curiam*), *cert. denied*, 527 U.S. 1005 (1999).

---

[3] Another Circuit has noted the value and purpose in the award of nominal damages to "guarantee that a defendant's breach of these duties will remain actionable regardless of their consequences in terms of compensable damages." *Amato v. City of Saratoga Springs*, 170 F.3d 311, 318 (2D CIR. 1999) (described as "[t]he primary purpose of nominal damages in these cases").

The Tenth Circuit has explicitly recognized that dismissal of claims for nominal damages for First Amendment violations is inappropriate even where other forms of relief (declaratory and injunctive) are no longer available. *Committee for First Amendment v. Campbell*, 962 F.2d 1517, 1526-27 (10TH CIR. 1992). And the Fifth Circuit has followed this Court's mandate that if proven, a violation of First Amendment rights concerning freedom of expression entitles a plaintiff to at least nominal damages. *See Fyfe v. Curlee*, 902 F.2d 401, 406 (5TH CIR.) (First Amendment and familial privacy rights), *cert. denied,* 498 U.S. 940 (1990); *Familias Unidas v. Briscoe*, 619 F.2d 391, 402 (5TH CIR. 1980) (First Amendment associational rights).

Thus, the courts below abused their discretion in denying class certification, because certification would have, at the least, entitled the class members to share in the declaratory and injunctive relief, and nominal damages, awarded to the professors.

II. THE DENIAL OF RELIEF BASED ON REVERSIBLE POST-COMPLAINT REMEDIAL MEASURES VIOLATES THIS COURT'S JURISPRUDENCE.

The Ninth Circuit panel refused to reverse the District Court's denial of declaratory relief and nominal damages as to United Academics' October 1998 demand for payment of fees, holding that the professors' claim for relief for the October notice was mooted by the December 1998 notice. The panel opined that:

> It is unreasonable to think that the Union would resort to conduct that it had admitted in writing was constitutionally deficient and had attempted to correct over fourteen months prior to the district court's disposition

> of Appellants' challenge.[4] In fact, the Union was attempting to comply with the *Hudson* standards several months before the district court filed its first order in which the court reviewed United Academics' initial demands and concluded they were constitutionally inadequate. We do not believe United Academics would now attempt to revert to the deficient notice format and subject itself to future litigation that it would clearly lose. Under these circumstances, we hold that the conceded defect was cured, and therefore mooted, by the Union's actions, and the district court correctly rejected Appellants' request for declaratory and injunctive relief.

App. A at 15a; 265 F.3d at 786-87. Thus, the sole justification for the panel's holding consists of faith in United Academics' good will and desire to avoid "future litigation that it would clearly lose." *Id.* That such a "desire" was insufficient to preclude four successive illegal demands for payment of union dues and/or agency fees, including two demands promulgated after suit was filed, seems not to have been considered by the panel.

---

[4] The panel's enthusiasm over the union's "attempt[s] to comply with the *Hudson* standards several months before the district court filed its first order in which the court reviewed United Academics' initial demands and concluded they were constitutionally inadequate," App. A at 15a; 265 F.3d at 786-87, is factually unjustified. United Academics' "efforts" occurred only after filing of the instant lawsuit, as the union initially demanded the payment of full union dues. R. 1, Exhibits B(1), C(1). The District Court had, long before "fil[ing] its first order" (App. C at 28a-39a, dated 16 February 1999) on the professors' summary judgment motion, "concluded that [the unions' demands] were constitutionally inadequate." *See* R. 13: Transcript of Hearing on Plaintiffs' Motion for a Temporary Restraining Order and/or a Preliminary Injunction, conducted on 26 May 1998, page 5.

A. The Conflict with This Court's Decisions.

Insofar as the professors seek declaratory and injunctive relief, and nominal damages for United Academics' concededly unlawful October 1998 demand, the panel paid mere lip service to this Court's decisions regarding mootness.

This Court has long recognized that a claim cannot be mooted simply because a defendant eschews the allegedly unlawful conduct when subjected to judicial scrutiny. *United States v. Generix Drug Corp.*, 461 U.S. 453, 456 n.6 (1983) ("The possibility that [the litigant] may change its mind in the future is sufficient to preclude a finding of mootness"); *see also Adarand Constructors*, 528 U.S. at 222 ("[v]oluntary cessation of challenged conduct moots a case ... only if it is '*absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur.' "). This principle is so firmly entrenched in federal jurisprudence that it is surprising that this Court is so frequently called upon to reaffirm it. *See Friends of the Earth v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)) ("It is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.' "). Indeed, this Court has previously rejected a union's attempt by post-filing conduct to moot a case. *Hudson*, 475 U.S. at 305 n.14, quoting *Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. at 203, and *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953), and *City of Mesquite*.

This Court has also made clear that "a case becomes moot only when subsequent events make it absolutely clear that the allegedly wrongful behavior cannot reasonably be expected to recur and 'interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.' " *County of Los*

Angeles v. Davis, 440 U.S. 625, 631 (1979) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)).

Nevertheless, the panel below — citing virtually no authority — found that United Academics met its heavy burden to demonstrate mootness simply upon the union's confessions of its own prior unlawful activity, because it would be "unreasonable" for the union to repeat it. App. A at 15a, 265 F.3d at 786-87.

The dearth of authority supporting this novel reasoning is, perhaps, because such a conclusion has been heretofore unknown to the law regarding mootness and "voluntary cessation of a challenged practice," *City of Mesquite*, 455 U.S. at 289. While mootness might be demonstrated had United Academics lost its status as the monopoly bargaining representative, or where a forced-unionism clause were no longer present, it certainly cannot be satisfied where, as here, the union's bargaining relationship with the professors' employer continues, and it persists in its efforts to extract fees from the professors and the class they seek to represent.

B. The Conflict Among the Circuits.

As with class certification, the panel's decision defies not only that of this Court and other Circuits, but also prior decisions of the Ninth Circuit.

The Ninth Circuit itself recently recognized that denial of procedural due process entitles the victim of such denial, "as a matter of law," to nominal damages. *Weinberg v. Whatcom County*, 241 F.3d 746, 755 (9TH CIR. 2000); *Wilks v. Reyes*, 5 F.3d 412, 416 (9TH CIR. 1993) ("The law of this circuit entitles a plaintiff to an award of nominal damages if the defendant violated the plaintiff's constitutional right ... even if the plaintiff

suffered no actual damage"); *see also Hudson*, 475 U.S. at 302-03 & n.12 (" '[P]rocedural safeguards often have a special bite in the First Amendment context' "). Yet the lower courts here refused to award nominal damages for the constitutional inadequacies they found in United Academics' October 1998 notice, denying the professors and absent class members alike the benefits of "[t]he law of th[e Ninth] Circuit." App. A at 13a-15a; 265 F.3d at 785-87.

Likewise, the Ninth Circuit has established a very stringent test to prove mootness. This standard, overlooked by the panel, does not include a panel's faith in a litigant's future good will.

> The standard for the voluntary cessation exception to mootness is "whether the defendant is free to return to its illegal action at any time." *Public Utilities Comm'n of California v. Federal Energy Regulatory Comm'n*, 100 F.3d 1451, 1460 (9TH CIR. 1996). In order to meet their burden, the [litigants] must show that "subsequent events [have] made it absolutely clear that the allegedly wrongful behavior cannot reasonably be expected to recur." *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260, 1274 (9TH CIR. 1998) (internal quotation omitted); *cf. Lindquist v. Idaho State Bd. of Corrections*, 776 F.2d 851, 854 (9TH CIR. 1985) (A case may become moot as a result of voluntary cessation of wrongful conduct only if "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.").

FTC v. Affordable Media, 179 F.3d 1228, 1238 (9TH CIR. 1999).

Thus, the Ninth Circuit has unequivocally held that a defendant's voluntary cessation of illegal conduct is "in itself insufficient to discharge the defendant's remedial obligation."

Star v. West, 237 F.3d 1036, 1039 (9TH CIR. 2001). Litigants asserting mootness by virtue of "voluntary cessation" of their unlawful conduct must establish two elements: " '(1) it can be said with assurance that "there is no reasonable expectation ..." that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.' " *Smith v. University of Washington Law School*, 233 F.3d 1188, 1194 (9TH CIR. 2000), quoting *Davis*, 440 U.S. at 631; *see also Norman-Bloodsaw*, 135 F.3d at 1274. This controlling intra-Circuit authority was not applied here, where United Academics' remedial obligation was utterly unmet by any damages award as to the illegal October and December 1998 demands. *Compare* App. E at 76a, ¶ 3.

Moreover, United Academics' post-suit "voluntary cessation" is not the sort that has **ever** before been recognized by the Ninth Circuit as sufficient to sustain mootness. Indeed, in *DiLoreto v. Downey Unified School District Board of Education*, 196 F.3d 958, 963 n.1 (9TH CIR. 1999), *cert. denied*, 529 U.S. 1067 (2000), the Ninth Circuit concluded that a live controversy remained even after unlawful conduct voluntarily ceased as a result of a policy adopted after the suit's commencement, comparing it unfavorably to a changed statute or regulation, that might be "changed again." *Id.*, citing *Sefick v. Gardner*, 164 F.3d 370, 372 (7TH CIR. 1998), *cert. denied*, 527 U.S. 1035 (1999). There, like here, a defendant remained free to revert to its challenged conduct, thus defeating any argument of "mootness" arising from its post-suit ameliorative conduct.

Other Circuits agree that mootness can never be sustained upon mere "voluntary cessation of challenged conduct" where the "defendant remains free to resume challenged practice." *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1237 n.10 (9TH CIR.

2001).[5] For example, the District of Columbia Circuit has recently held that mootness cannot be shown where there is "a 'reasonable expectation that the same complaining party would be subjected to the same action again.' " *Liu v. INS*, — F.3d —, 2001 WL 1657298 (D.C. CIR. 2001); *see also Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. District of Columbia*, 972 F.2d 365, 370 (D.C. CIR. 1992). The Sixth Circuit has similarly ruled. *Duja Va of Nashville, Inc. v. Nashville*, 274 F.3d 377, 390-91 (6TH CIR. 2001).

Moreover, mootness occurs only where the courts are incapable of granting to the litigant meaningful relief. *Florida Right to Life, Inc. v. Lamar*, 273 F.3d 1318, 1324 (11TH CIR. 2001). This includes circumstances where a complaining plaintiff has absented herself from being subject to the defendant's ability to impose harm. *Grandson v. University of Minnesota*, 272 F.3d 568, 574-75 (8TH CIR. 2001) (case moot where complaining student had left University); *see also Doe v. Delie*, 257 F.3d 309, 314 (3D CIR. 2001) (case mooted when complaining prisoner was released from custody). Certainly this case is distinguishable from those mooted because litigants were no longer subject to a defendant's allegedly unlawful conduct.

This case presents the quintessential case of "voluntary cessation" alleged to moot a case. United Academics retains the right to enforce a forced-unionism clause against the professors as a condition of continued University employment, and the professors remain subject to United Academics' behavior. United Academics has been left free, by virtue of the District Court's

---

[5] Just a month before the decision in this case was issued, another Ninth Circuit panel reaffirmed this bedrock principle. *Morrison v. Hall*, 261 F.3d 896, 900 n.5 (9TH CIR. 2001), citing *Laidlaw Envtl. Servs.*, 528 U.S. at 189.

refusal to enter injunctive relief and the Ninth Circuit's blind faith in United Academics to behave "reasonably" in the future, to return to its old ways.

III. The Requirement That Employees Surrender Their Right to an Immediate Advance Reduction and Risk an Increase in the Fee Calculation Conflict with Jurisprudence Barring Imposition of Unconstitutional Conditions.

This Court has held that "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act as a content-based regulation of speech." *Riley v. National Fed. of the Blind*, 487 U.S. 781, 795 (1988). Of course, content-based regulation of speech triggers the highest level of judicial evaluation, *i.e.*, "strict scrutiny." *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 827-29 (1995) (content-based discrimination is presumptively unconstitutional); *Burson v. Freeman*, 504 U.S. 191, 197-98 (1992) (content-based restrictions are subject to "strict scrutiny," with a showing that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end") (citations omitted). Strict scrutiny is required where government regulates political expression on the basis of its content to ensure that expression is not suppressed because of public officials' disapproval of the speaker's view. *Widmar v. Vincent*, 454 U.S. 263, 276 (1981); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 536 (1980). The panel's affirmance of the District Court's refusal to strike down United Academics' procedure's discrimination between objectors and challengers and its threat of an increased fee violates these mandates.

A. The Conflict with This Court's Decisions.

In *Gibson v. Florida Bar*, 499 U.S. 918 (1991), this Court granted *certiorari* to address the question of whether a unified bar association was required to provide an immediate advance reduction of bar dues to attorneys exercising their right to refrain from supporting the bar's political and ideological activities. *Id.*, 906 F.2d 624, 631 (11TH CIR. 1991). While the petition was later dismissed as "improvidently granted," 502 U.S. 104 (1991), questions about the manner in which organizations given state sanction to obtain individuals' involuntary support should be permitted to exact funds are still important. *Cf. Board of Regents of the University of Wisconsin v. Southworth*, 528 U.S. 804 (2000) (public university's student fee funding extra-curricular speech activities). This is true particularly where, as here: (1) a labor union exacts more than that to which it concedes it is entitled from those who exercise their constitutional right under *Hudson* to obtain "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker," 475 U.S. at 310; and (2) employees must risk payment of a higher fee if they dare to put the union to its proofs.

Nonunion public employees can be compelled, consistent with the Constitution, to bear only their *pro rata* share of the costs of collective bargaining, contract administration, and grievance adjustment. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977). However, **before** a union and/or a public employer are entitled to take any action to enforce such an obligation, they must comply fully with "the constitutional requirements for the ... collection of agency fees." *Hudson*, 475 U.S. at 310. The First, Fifth, and Fourteenth Amendments require that certain notice and procedural protections be provided to public employees who exercise their right to refrain from membership in employee organizations but are subjected to

demands for payment of agency fees. *Id.* at 306; *see also Abood*; *Tierney v. City of Toledo ("Tierney II")*, 824 F.2d 1497, 1502 (6TH CIR. 1987); *Laramie v. County of Santa Clara*, 784 F. Supp. 1492, 1503 (N.D. CAL. 1992) (entering favorable judgment on nonmembers' Fifth Amendment claim).

Hudson mandates four procedural safeguards which "the government and union have a responsibility to provide [to all 'potential objectors']... that minimize that impingement [on First Amendment rights] and that facilitate a nonunion employee's ability to protect his rights." 475 U.S. at 307 n.20, 306. Those safeguards are: (1) the good-faith advance reduction of the fee to no more than that portion of the union's expenditures required for its execution of its duties as the nonmembers' exclusive bargaining representative, *id.* at 305-06, 310; (2) financial disclosure prior to any demand for or collection of the reduced fee that allows nonmembers to gauge the propriety of the union's fee and intelligently decide whether to challenge the fee calculation before an impartial decisionmaker, *id.* at 306-07, 310; (3) an opportunity to challenge the calculation before an impartial decisionmaker, *id.* at 307-09, 310; and (4) an escrow of amounts reasonably in dispute pending such challenges. However, escrow alone is insufficient to render collection of fees constitutional. *Id.* at 309-10.

Procedural safeguards serve **two goals** in this context. First, they insure that the fees demanded and/or collected include only the employee's *pro rata* share of constitutionally chargeable costs. *Hudson*'s holding—setting forth "the constitutional requirements for the Union's **collection** of agency fees"—insures against both misuse of collected funds **and** excessive collections. *Id.* at 310 (emphasis added). Second, procedural safeguards "facilitate a nonunion employee's ability to protect his rights." *Id.* at 303, 307 n.20.

The District Court's and Ninth Circuit's analyses fail to satisfy strict scrutiny. The requirement that challenging professors tender full union dues and that challengers risk imposition of a higher fee by the impartial decisionmaker violate this Court's mandate that agency fee procedures be calculated to "facilitate a nonunion employee's ability to protect his rights." *Hudson*, 475 U.S. at 303, 307 n.20. Both requirements discourage professors from challenging United Academics' fee calculation and, thus, impose unconstitutional conditions upon the exercise of nonmembers' constitutional right to challenge the union's fee calculation. *See*, *e.g.*, *Torcaso v. Watkins*, 367 U.S. 488, 496 (1961) (state is prohibited from compelling affirmance in belief in God as a condition for holding public office); *Elrod v. Burns*, 427 U.S. 347, 363-64 n.17 (1976) (state is prohibited from requiring affiliation with a political party as a condition for obtaining public employment).

B. The Conflict Among the Circuits.

Applying this Court's normal strict scrutiny analysis to various union procedures in the wake of *Hudson*, other courts have struck down union schemes which discourage nonmembers from exercising their constitutional rights.

The Sixth Circuit has held that an immediate advance reduction is mandated by *Hudson*. *Tierney II*, 824 F.2d at 1503-04 ("upon making their objections, dissenting non-members are entitled immediately to an 'advance reduction' of that portion of their fees which an independent audit unquestionably indicates would be spent for ideological purposes"); *accord Damiano v. Matish*, 830 F.2d 1363, 1370 (6TH CIR. 1987).

The Ninth Circuit itself recognized that "[r]equiring agency fee payers to go through the inconvenience, embarrassment, and

delay of recovering even a small sum ... is a burden they cannot be required to bear, unless there's a compelling reason for requiring it and the procedure itself is reasonable." Thus, it held that *Hudson*'s "preferred method of doing things," including an immediate "advance reduction" of the fee, was not necessary only where a union made a showing that it was "impossible or, at any rate, far more costly or cumbersome." *Grunwald*, 994 F.2d at 1375.[6]

Likewise, the Sixth Circuit has struck down union schemes "calculated to discourage meaningful objections to union activity." *Damiano*, 830 F.2d at 1372; *see also Weaver v. University of Cincinnati*, 942 F.2d 1039, 1046-47 (6TH CIR. 1987) (striking down requirement that objections be sent *via* certified mail); *accord Laramie*, 784 F. Supp. at 1499-1500; *Kidwell v. Transportation Communications Int'l Union*, 731 F. Supp. 192, 205 (D. MD. 1990). The panel's affirmance of the requirement that challengers tender full union dues and risk that the impartial

---

[6] While *Grunwald*'s fidelity to *Hudson* is questionable, the panel's fidelity to *Grunwald* is transparent lip service. The panel required no showing of impossibility or undue expense, or any expense at all, and the Record is devoid of any such showing. To be sure, both courts quoted *Grunwald*'s language, App. A at 9a-11a, 265 F.3d at 783-84; App. D at 53a-55a, but neither demonstrated how providing challengers the advance reduction which the union provided to objectors was either "impossible" (obviously it wasn't, as mere objectors received it), or "far more costly or cumbersome." 994 F.2d at 1375. Instead, the District Court merely declared the procedure "very much like that at issue in *Grunwald*," App. D at 54a, and, like the panel, declares that resemblance good enough to meet the *Grunwald* test. *Id.* at 56a. *Grunwald* self-consciously set out an exception to "the preferred method of doing things" requiring a fact specific analysis and justification. 994 F.2d at 1375-76. Both the panel and the District Court ignored this requirement, declaring mere resemblance of the procedure adequate to meet its "test."

decisionmaker will impose an increased fee conflicts with these Sixth Circuit decisions, thereby justifying the grant of this Petition.

CONCLUSION

For the reasons stated above, this petition for a writ of *certiorari* should be granted, and the case set for plenary briefing and argument on the important questions presented herein.

Respectfully submitted,

W. JAMES YOUNG*
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

ATTORNEY FOR PETITIONERS
*Counsel of Record

January 2002

APPENDICES

APPENDIX A

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

6 September 2001

[265 F.3d 778]

Robert F. CARLSON; John Morack, Plaintiffs-Appellants,

v.

UNITED ACADEMICS-AAUP/AFT/APEA AFL-CIO, Defendant-Appellee.

No. 00-35399

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 17, 2001
Filed Sept. 6, 2001

[780]W. James Young, National Right to Work Legal Defense Foundation, Inc., Springfield, Virginia, for the appellants.

William K. Jermain, Sarah E. Josephson and Randall G. Simpson, Jermain, Dunnagan & Owens, P.C., Anchorage, Alaska, for the appellee.

Appeal from the United States District Court for the District of Alaska; James K. Singleton, Chief District Judge, Presiding. D.C. No. CV-98-00141-A-JKS

Before: HUG, T.G. NELSON, Circuit Judges, and PREGERSON, District Judge.*

---

* Honorable Dean D. Pregerson, United States District Judge for the Central District of California, sitting by designation.

HUG, Circuit Judge:

This case involves a dispute between a union representing professors at the University of Alaska and two professors who have not joined the union, object to paying union dues, and contest the manner in which the agency union fee for collective bargaining purposes is determined and collected.

BACKGROUND

Appellants Robert Carlson and John Morack are professors of the University of Alaska at Fairbanks. Appellants are part of a bargaining unit comprising teaching and research faculty at the University as set forth in a collective bargaining agreement between the University and United Academics-AAUP/AFT, AFL-CIO ("United Academics" or "the Union"). United Academics acts as bargaining agent and exclusive representative of Appellants and other members of the bargaining unit. The collective bargaining agreement requires all research and teaching faculty in the unit to maintain membership in the Union, or for those faculty members who choose to refrain from union membership, to pay mandatory "agency fees" as a condition of continued employment.

In March 1998, United Academics sent a letter to all nonmembers demanding that each professor tender "1.25% (.0125) of your bi-weekly salary with a $720 cap per calendar year." The letter also advised:

> [a]s a condition of your employment and continuing employment, you are required to provide the University with written authorization to deduct [agency] fees from your

paycheck (or make an alternate arrangement for their direct payment to United Academics). The payment of the fees is not an option; it is mandatory so long as you work at the University of Alaska and are represented by United Academics.

[781]To those nonmembers who failed to respond to the first demand letter, including Appellants, the Union repeated its demands in a letter dated April 21, 1998. The letter warned members that "[i]f the [dues checkoff authorization] form is not received by May 1, the next correspondence you will receive will be a letter informing you that United Academics has requested that the University terminate your employment per Article 4 of the Collective Bargaining Agreement."

The letter also notified members that unless recipients authorized dues deductions by April 24, 1998, the Union would require payment of agency fees retroactive to January 1, 1998. Finally, the letter provided that if an employee failed to authorize automatic dues deductions by April 24, 1998, "United Academics will seek the collection of those fees through the courts and/or a collection agency regardless of the subsequent receipt of your fee deduction form or your future employment at the University of Alaska."

On May 5, 1998, Appellants filed a verified class action under 42 U.S.C. § 1983 alleging violations of their First, Fifth, and Fourteenth Amendment rights. Appellants sought damages as well as declaratory and injunctive relief, equitable restitution, punitive damages, and attorneys' fees and costs. Specifically, the complaint alleged that United Academics' demands failed to provide the notice and procedural safeguards required by the

United States Supreme Court in *Chicago Teachers Union Local No. 1 v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986).

In August of 1998, Appellants filed a motion for class certification. The district court denied Appellants' motion. Subsequently, Appellants filed a motion for summary judgment which the district court granted in part and denied in part. The court found as a matter of law, that the Union's initial demands "clearly offended the notice and procedural safeguards mandated by *Hudson*." Based on this finding, the district court concluded that Appellants were entitled to nominal damages and declaratory relief.

While the suit was pending before the district court, United Academics mailed two additional notices to members of the bargaining unit. On October 12, 1998, the Union sent a notice advising members that "[a]gency fees pursuant to the requirements of the United States Supreme Court decision *Chicago Teachers Union v. Hudson* will be initiated on November 15, 1998. Any agency fees collected prior to November 15, 1998 will be reimbursed to individual faculty members."[1] Subsequently, on December 1, 1998, United Academics mailed to bargaining unit members documents that "were inadvertently

---

[1] With the October notice, United Academics attached a document titled "Schedule of Expenses and Allocation between Chargeable and Nonchargeable Expenses," which disclosed that United Academics made payment to the American Association of University Professors ("AAUP"), American Federation of Teachers ("AFT"), and Alaska Public Employees Association/AFT ("APEA/AFT").

omitted from the material accompanying the *Chicago Teachers Union v. Hudson* notice."[2]

On May 10, 1999, Appellants filed a renewed motion for summary judgment in which they challenged United Academics' October and December demands. In re-[782]sponse, United Academics filed a motion for partial summary judgment. The parties disputed whether the December mailing cured, and therefore mooted, the admitted deficiencies of the October mailing. The district court concluded that because United Academics conceded the October notice was deficient and remedied the deficiency with the December mailing, the sufficiency of the notice should be determined by considering both the October and December mailings.

In addition, as relevant to this appeal, the district court found that United Academics' subsequent demands (1) did not discriminate between those individuals who merely object to payment of full union dues and those individuals who object to payment of the dues and who wish to challenge the Union's fee calculation before an impartial decisionmaker; and (2) did not violate *Hudson* by permitting an impartial decisionmaker to increase the fee amount. The court denied Appellants' request for

---

[2] With the December notice, United Academics provided copies of the American Arbitration Association's Rules for Impartial Determination of Union Fees, the AAUP's "Allocation of Expenses-Fee Rebate," the AFT's statement discussing "allocation between chargeable expenses and nonchargeable expenses," and the APEA/AFT's independent auditor's report discussing chargeable and nonchargeable expenses.

a permanent injunction finding that "it appears that the parties are now in virtual agreement regarding the form of notices to be sent in the future to comply with *Hudson*." The court also granted United Academics' motion for partial summary judgment, dismissing Appellants' claims for punitive damages and injunctive relief.

On appeal, Appellants argue that the December notice violated *Hudson* because the notice (1) discriminates between objectors and challengers, and (2) allows the Union to seek an increased fee from nonmembers challenging its calculation. Appellants also contend that the district court erred when it treated their challenge to United Academics' October notice as moot. Finally, Appellants challenge the district court's denial of class certification.

The district court had jurisdiction pursuant to 18 U.S.C. §§ 1331 and 1343. We have jurisdiction pursuant to 28 U.S.C. § 1291.

DISCUSSION

I. December Notice

We review a district court's grant of summary judgment de novo. *See Block v. City of Los Angeles*, 253 F.3d 410, 416 (9th Cir.2001). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *See id.*

It is well-settled that a nonunion member can be forced to share in the expenses incurred by a union in its role as the exclusive bargaining representative on behalf of employees. *See Hudson*, 475 U.S. at 301, 106 S.Ct. 1066. However, a union cannot, without infringing upon First Amendment rights, force nonmembers to pay for expenses related to political and ideological activities unrelated to the union's duties as bargaining representative. *See id.* at 302, 106 S.Ct. 1066. In *Hudson*, the Supreme Court set forth three procedural requirements that a union must satisfy before collecting fees through an agency shop agreement. First, the union must provide nonmembers with an "adequate explanation" of the basis for calculating the agency fee so potential objectors can determine whether the fee is in fact fairly calculated. *Id.* at 310, 106 S.Ct. 1066. Second, if a nonmember objects to the agency fee calculation, the union's procedure must provide "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker." *Id.* Third, the union must create "an escrow for the amounts reasonably in dispute while such challenges are pending." *Id.*

[783]Appellants contend that two aspects of the Union's procedures violate the *Hudson* requirements. First, Appellants argue that the Union's two-class objection system discriminates between nonmembers who object to the agency fee but accept the Union's reduced fee computation and those nonmembers who challenge the agency fee calculation. Second, Appellants argue that the Union's procedural scheme, which allows the arbitrator to increase the agency fee, is designed to discourage nonmembers from challenging the amount of the fee and is unconstitutional.

A. *Discrimination Between Challengers And Objectors*

Under the Union's procedures, professors who object to paying full union dues are offered two options: "Class I" Objection or "Class II" Objection. A "Class I Objecting Agency Fee Payer" is an employee in the collective bargaining unit who (1) does not choose to join United Academics; (2) objects to the use of his or her service fees for purposes unrelated to collective bargaining, contract administration and grievance adjustment; and (3) accepts the reduced agency fee as determined by United Academics. Upon receiving a Class I objection notice, United Academics promptly issues a rebate of the total amount in excess of the Union's determined agency fee that had been deducted to date. Further refunds are made before dues are deducted or are unnecessary because the future monthly dues are reduced to the appropriate amount. Class I objectors waive their right to challenge the amount of the fee before an impartial arbitrator and may not have their fees reduced based on the outcome of another objector's arbitration.

A "Class II Objecting Agency Fee Payer" is an employee in the collective bargaining unit who (1) does not choose to join United Academics; (2) objects to the use of his or her service fees for uses unrelated to collective bargaining, contract administration and grievance adjustment; and (3) objects to the reduced service fee as determined by United Academics. Under the Union's procedure, a Class II objector requests that an impartial arbitrator promptly hear the objector's challenge. If United Academics receives a timely Class II objection, the Union requests that the American Arbitration Association ("AAA") appoint an independent arbitrator "to hold a hearing to determine the percentage of the union's budget for the service fee year that

will be expended for chargeable activities." Class II objectors are required to agree that (1) the arbitrator may approve the Union's calculations or increase or decrease the amount attributable to "non-chargeable" activities; (2) the full amount of the agency fee that the Union receives will be retained in an interest-bearing escrow account until the arbitrator resolves the challenge; and (3) United Academics will thereafter transmit to the objector that amount of the fee attributable to "non-chargeable" activities as determined by the arbitrator, plus interest as appropriate.

Appellants contend that United Academics provides an immediate advance reduction to those professors who merely object but do not challenge the fee calculation (Class I objectors), while the Union denies an immediate advance reduction to those professors exercising their right to challenge its fee calculation (Class II objectors). Appellants allege that by doing so, United Academics intends to discourage challenges to the Union's fee calculation. We disagree and conclude that the district court correctly rejected Appellants' challenge to the procedures.

In reaching its decision, the district court relied upon *Grunwald v. San Ber-*[784]*nardino City Unified Sch. Dist.*, 994 F.2d 1370 (9th Cir.1993), in which this court upheld a similar procedure whereby dues were deducted and placed in an escrow pending resolution by an arbitrator. In *Grunwald*, nonunion teachers brought suit challenging a procedure in which the school district deducted one-tenth of the annual union dues for each of the ten months the teachers worked, regardless of whether the teacher was in the union or not. *See id.* at 1372. The union members' deductions were sent to the unions while the agency fee payers' deductions were placed in an interest bearing escrow account. *See id.* To receive a refund, nonmembers were required

to submit a letter objecting to the union's discretionary use of fees. *See id.* at 1373. Nonmembers could either accept the union's calculations and receive a rebate for the entire year or dispute the union's calculations and request that an arbitrator decide the percentage of the refund. *See id.* Plaintiffs challenged the "deduction-escrow-refund" procedure claiming the school district could not deduct more than what the union was entitled to receive for collective bargaining purposes, even temporarily. *See id.*

The court recognized that a system whereby full dues are removed and the objecting employee bears the burden of seeking a refund potentially burdens employees' constitutional rights "unless the procedure serves a legitimate purpose and is administered in a fair and impartial fashion." *Id.* at 1375. Yet, after reviewing the disputed procedure, the court concluded:

> [i]deally ... the union would collect from nonmembers only that amount used for representational purposes. But that is not so easy to accomplish in practice. Here, the union has advanced a legitimate reason for the procedure it has adopted: Its ranks and the ranks of the agency fee payers change from year to year. Mindful of this fact, the union has come up with a procedure that strikes a proper balance between the union's right to charge fees for collective bargaining activities and the plaintiffs' First Amendment right to be free from forced contribution to causes with which they disagree. Tyranny of the majority this is not.

Id. at 1377.

The procedure at issue is similar to the procedure upheld in *Grunwald*. If a professor objects but accepts the computation of the reduced agency fee as determined by United Academics, regular monthly deductions of the full agency fee are taken from the objector's salary, and the non-chargeable amount is either rebated by the Union or simply deducted from the objector's monthly agency fee. If a professor objects but wishes to challenge the reduced agency fee as determined by United Academics, regular monthly deductions based upon the full agency fee are taken from the challenger's salary and immediately placed into an interest bearing escrow account until an impartial arbitrator resolves the challenge. If the challenger prevails, he or she is entitled to the monetary value of any correction by the arbitrator. Thus, both challengers and objectors are subjected to regular monthly deductions based on the full agency fee and are entitled to a rebate of the nonchargeable amounts.

While it is true that challengers do not receive a rebate until the dispute is resolved by an impartial arbitrator, we conclude that the Union's procedures comply with the *Hudson* standards. First, the procedures "provide for a reasonably prompt decision by an impartial decisionmaker." *Hudson*, 475 U.S. at 307, 106 S.Ct. 1066. Challengers have their objec-[785]tions "addressed in an expeditious, fair, and objective manner." *Id.* Second, challengers' fees are placed in an interest-bearing escrow account. Thus, there is no risk that challengers' money can be used by the Union for non-representational purposes pending resolution of the challenge. *See Grunwald*, 994 F.2d at 1374. In addition, United Academics' procedures provide for a reasonably prompt refund of the nonchargeable amounts. *See id.* at 1377. Finally, the Union has provided an "adequate explanation" for adopting the deduction-escrow-refund procedure at issue. *Hudson*, 475

U.S. at 309, 106 S.Ct. 1066. As the district court noted, the agency fee payers in the current action vary from year to year. The individual salaries do not go into effect until faculty members return in September to commence the work year. Prior to that time, the Union cannot easily contact new faculty members to determine if they wish to object or challenge the agency fees. Thus, we conclude that the deduction- escrow-refund procedure that United Academics has adopted for professors who challenge the Union's computation of fees is "appropriately justified." *Grunwald*, 994 F.2d at 1376. Accordingly, we reject Appellants' challenge to the two-class objection system.

B. *Arbitrator's Ability to Increase Agency Fee*

Appellants also object to the Union's requirement that Class II objectors must agree that "the arbitrator may either approve the United Academics, AAUP/AFT calculations or increase or decrease the amount attributable to 'non-chargeable' activities." Appellants argue that a system which allows the Union to seek a higher chargeable percentage violates *Hudson*'s requirements.

The district court rejected Appellants' argument and found that the system satisfied the *Hudson* requirements. We agree with the district court's determination.

Appellants fail to articulate precisely how the provision violates *Hudson*. Under United Academics' procedures, an impartial arbitrator is responsible for approving the Union's calculations and determining whether the amounts attributable to nonchargeable activities should be adjusted upward or downward. Appellants contend that by allowing an arbitrator to increase the agency fee, United Academics seeks to chill an agency

fee payer's decision to challenge the fee determination. However, the arbitrator is appointed by the American Arbitration Association. Thus, the selection does not represent the Union's unrestricted choice. *See Hudson*, 475 U.S. at 308 n. 21, 106 S.Ct. 1066; *Grunwald*, 994 F.2d at 1376. Further, both parties "may offer such evidence as they desire and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute." American Arbitration Association, "Rules for Impartial Determination of Union Fees" (Jan. 1, 1988). We do not believe the Union could successfully influence a neutral arbitrator so as to prejudice the objectors. Instead, adjustments in the chargeable amount would likely occur only if the arbitrator finds an error in previous calculations. The adjustments can either increase or decrease the amount attributable to nonchargeable activities. Based on these factors, we conclude that the provision does not violate the *Hudson* requirements.

II. October Notice

We review a district court's determination of mootness de novo. *See Knight*[786]*v. Kenai Peninsula Borough Sch. Dist.*, 131 F.3d 807, 811 (9th Cir.1997).

On appeal, Appellants argue that the district court erred when it treated United Academics' remedial measures, subsequent to its October mailing, as mooting their claim that the October demand, standing alone, violates the *Hudson* requirements. Appellants contend that because the court agreed the October demand is constitutionally inadequate when standing alone, it erred when it failed to enter a judgment declaring it to be so. Appellants maintain that United Academics remains free to return

to the inadequate notice procedure employed by the Union in October.

The district court recognized that in *Hudson*, the Supreme Court rejected an argument that a union's alteration of its notice procedures after trial mooted alleged deficiencies in the union's notice procedures. Notwithstanding *Hudson*, the court concluded there was little concern that United Academics would fail to provide complete notice in the future, as the Union had readily conceded the October notice was inadequate and had subsequently mailed a notice in compliance with *Hudson*.

It is undisputed that as a general rule "[v]oluntary cessation of challenged conduct moots a case ... only if it is '*absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222, 120 S.Ct. 722, 145 L.Ed.2d 650 (2000) (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968)). Although the burden of demonstrating mootness is a heavy one, *see id.*, we find that the burden is fully met on this record.

In the current action, United Academics mailed the October and December 1998 notices prior to the district court's disposition of Appellants' first summary judgment motion challenging the earlier notices. Because Appellants' initial complaint did not address the October and December mailings, the court's first order, dated February 16, 1999, only addressed Appellants' challenge to the earlier notices. The court declined Appellants' request to review the subsequent mailings absent the filing of a supplemental pleading "setting forth the events which have transpired since the filing of their complaint."

Based on the district court's statement, Appellants filed a renewed motion for summary judgment on May 10, 1999, in which they challenged the October and December notices. Many of the arguments in Appellants' motion focused on the insufficiency of the October mailing without reference to the material provided in the December mailing. However, when the district court considered and ruled on Appellants' renewed motion for summary judgment, the Union had conceded many months prior that the October notice was inadequate and had distributed the omitted material to all objectors in an attempt to comply with *Hudson*. Thus, the procedure as presented to the district court included both the admittedly deficient October demand and the amended December demand.

We conclude that the district court did not err in declining Appellants' request to grant declaratory and injunctive relief as to the October notice. It is unreasonable to think that the Union would resort to conduct that it had admitted in writing was constitutionally deficient and had attempted to correct over fourteen months prior to the district court's disposition of Appellants' challenge. In fact, the Union was attempting to comply with the *Hudson* standards several months before the dis-[787]trict court filed its first order in which the court reviewed United Academics' initial demands and concluded they were constitutionally inadequate. We do not believe United Academics would now attempt to revert to the deficient notice format and subject itself to future litigation that it would clearly lose. Under these circumstances, we hold that the conceded defect was cured, and therefore mooted, by the Union's actions, and the district court correctly rejected Appellants' request for declaratory and injunctive relief.

III. Class Certification

Appellants challenge the district court's denial of class certification. Because we affirm the district court judgment for the Union on the merits, class certification would serve no purpose. Thus, we do not consider whether the district court abused its discretion in denying Appellants' motion for class certification.

AFFIRMED

APPENDIX B

ORDER DENYING MOTION FOR CLASS CERTIFICATION IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

16 November 1998

[Clerk's stamps omitted in printing]
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ROBERT F. CARLSON and JOHN MORACK, Plaintiffs, vs. UNITED ACADEMICS-AAUP/AFT, AFL-CIO, Defendant.	Case No. A98-0141 CV (JKS) ORDER DENYING MOTION FOR CLASS CERTIFICATION

This is a civil rights lawsuit filed under 42 U.S.C. § 1983. Grounded in the First, Fifth and Fourteenth Amendments to the United States Constitution, Plaintiffs' complaint seeks injunctive relief, declaratory relief, equitable restitution, nominal damages and punitive damages to redress the alleged deprivation under color of Alaska law of Plaintiffs' rights. The controversy at issue relates to Defendant United Academics-AAUP/AFT, AFL-CIO's ("United Academics") allegedly unlawful demand for compliance with the "Membership, Dues Deduction, and Agency Fee" article of the collective bargaining agreement between United Academics and the University of Alaska (the "University").

Plaintiffs Robert F. Carlson and John Morack have filed a motion requesting class certification. *See* Docket Nos. 14 (motion), 18 (reply). Plaintiffs seek to represent a class of nonunion University faculty members (the "nonmembers") from

whom United Academics, in the absence of the notice and procedural safeguards mandated by the Supreme Court in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), demanded payment of agency fees. United Academics opposes the motion. *See* Docket No. 17 (opposition). Plaintiffs have requested oral argument. *See* Docket No. 19.[1]

FACTUAL BACKGROUND

Plaintiffs Robert F. Carlson and John Morack are employees of the University at its Fairbanks campus. (Complaint ¶ 6) They are employed in a bargaining unit comprising teaching and research faculty at the University, as set forth in a collective bargaining agreement between the University and United Academics. (Complaint ¶ 6 & Exh. A) The collective bargaining agreement requires all research and teaching faculty in the bargaining unit to either maintain membership in United Academics, or, for those faculty members who have chosen to refrain from membership in United Academics, to pay mandatory "agency fees" as a condition of continued employment. (Complaint ¶ 19 & Exh. A at 9) Nearly 300 individuals in the bargaining unit, including Plaintiffs, were nonmembers of United Academics as of March 1, 1998. (Docket No. 14, Exh. A at 1-2)

In mid-March 1998, United Academics, by its Treasurer C. Patrick Fort, sent a letter to Plaintiffs and all other nonmembers

---

[1] The Court has reviewed the record and the parties' briefing and concludes that the parties have sufficiently briefed the issues to the extent that oral argument will not be helpful. *See* D. AK. LR 7.1(i). *See also United States v. Cheely*, 814 F. Supp. 1430, 1436 n.4 (D. Alaska 1992), *aff'd*, 36 F.3d 1439 (9th Cir. 1994) (discussing oral argument in criminal context but principles remain applicable).

demanding they "provide the University with written authorization to deduct [agency] fees from your paycheck (or make an alternate arrangement for their direct payment to United Academics)." (Complaint ¶ 21 & Exh. B(1)) The letter further stated that "[t]he payment of the fees is not an option; it is mandatory so long as you work at the University of Alaska and are represented by United Academics." (Exh. B(1))

To those nommembers not responding to this first demand, including Plaintiffs, United Academics repeated its demands by letter dated April 21, 1998. (Complaint ¶ 24 & Exhs. C(1)-C(3)) The letter stated that "[i]f the [dues checkoff authorization] form is not received by May 1, the next correspondence you will receive will be a letter informing you that United Academics has requested that the University terminate your employment per Article 4 of the Collective Bargaining Agreement." (Exh. C(1)) The letter also stated that, unless the recipients were to authorize dues deductions by April 24, 1998, United Academics would require payment of agency fees retroactive to January 1, 1998, and that if an employee failed to authorize automatic dues deductions by April 24, 1998, the union would "seek the collection of those fees through the courts and/or a collection agency." (Exh. C(1)) By May 1, 1998, the number of nonmembers had been reduced from nearly 300 to 194. (Docket No. 14, Exh. A at 4)

Plaintiffs filed a "Verified Class Action Complaint" on May 5, 1998, thereby initiating this lawsuit. Plaintiffs allege that United Academics' demand – made uniformly on all nonunion faculty members (*see* Docket No. 14, Exh. B at 9) – was insufficient as a matter of law for failure to provide the notice and procedure safeguards which are conditions precedent to the demand for and/or collection of any compulsory agency fees by unions from nonmembers. *See Hudson*, 475 U.S. at 310.

DISCUSSION

1. Validity of Agency Fee Deductions

A union that has been certified as the exclusive bargaining representative for a group of employees must represent every employee in the bargaining unit, even those who do not belong to the unit. As a result, the union is entitled to charge the nonmembers their pro rata share of the expenses it incurs in negotiating and administering the collective bargaining agreement. That charge, commonly called an "agency fee" or an "agency shop fee," is deducted from the employee's wages by the employer.

If a public employer deducts the union's agency fees from its employees' wages, and part of the fee is used to advance the union's political or ideological goals, both the public employer and the union can be held liable in a suit under 42 U.S.C. § 1983 for violating the nonmembers' right of free speech under the First and Fourteenth Amendments. *See Abood v. Detroid Bd. of Educ.*, 431 U.S. 209 (1977). Furthermore, the First Amendment has been held to require the pubic employer and the union to establish efficacious procedures, including notice and right to a hearing, for determining how much of the union's agency fee is proper. *See Hudson*, 475 U.S. at 307.

2. Proposed Class and Requirements for Class Certification

The class Plaintiffs seek to represent is defined as follows:

All faculty of the University of Alaska within the relevant bargaining unit who are: (1) represented exclusively for

purposes of collective bargaining by Defendant United Academics; and (2) who are nonmembers of United Academics, or were nonmembers at any time when "agency fees" were demanded of and/or collected from nonmembers.

See Complaint ¶ 11; Docket No. 14 at 5. Plaintiffs maintain that this class can also be defined as a class of "potential objectors" as described in *Hudson*, 475 U.S. at 306.

In order to maintain a class action, a plaintiff must meet all the requirements of Rule 23(a) of the Federal Rules of Civil Procedure. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019-21 (9th Cir. 1998); *Smith v. University of Wash. Law Sch.*, 2 F. Supp. 2d 1324, 1341 (W.D. Wash. 1998). Rule 23(a) requires that (1) the class be so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. *See* FED. R. CIV. P. 23(a). Additionally, the plaintiff must satisfy the criteria of at least one of the categories in Rule 23(b). *See Smith*, 2 F. Supp. 2d at 1340. In this case, Plaintiffs seek certification under Rules 23(b)(1)(A) and 23(b)(2).[2]

---

[2] In pertinent part, Rule 23(b) provides as follows:

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

* * *

(continued...)

Plaintiffs, as the party seeking class certification, bear the burden of demonstrating that each of the requirements of Rule 23(a) have been met. *See Mayfield v. Dalton*, 109 F.3d 1423, 1427 (9th Cir. 1997) (citing *In re Northern Dist. of Cal., Dalkon Shield IUD Prods. Liability Litig.*, 693 F.2d 847, 854 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983)). Plaintiffs have satisfied the numerosity and commonality requirements in this case. *See Hanlon*, 150 F.3d at 1019-20. The focus of the parties' attention in their briefing, and the focus of the discussion contained in this order, concerns Plaintiffs' obligation to satisfy the latter two requirements under Rule 23(a). Namely, the typicality and adequacy of representation requirements set forth in Rules 23(a)(3) and (4).

3. Typicality and Adequacy of Representation

While the "numerosity" and "commonality" requirements of Rule 23(a) concentrate on the characteristics of the class, the last two prerequisites, "typicality" and "adequate representation," focus instead on the desired characteristics of the class representative. *See* HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 3.13, at 3-71 (3d ed. 1992). Because of the close interrelationship between the typicality and adequate representation tests, courts frequently discuss both of them

---

[2] (...continued)

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole[.]

See Fed. R. Civ. P. 23(b).

together in their class rulings, thereby efficiently disposing of their overlapping elements. *See, e.g., Eisenberg v. Gagnon*, 766 F.2d 770, 788 (3d Cir.), *cert. denied*, 474 U.S. 946 (1985).

Typicality has been interpreted to mean that "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *See General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982) (quoting *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)). The claims of the representative need not be identical to the claims of the class, but they must "arise from the same remedial and legal theories.'" *See Smith*, 2 F. Supp. 2d at 1342 (quoting *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 449 (N.D. Cal. 1994)). The rationale for this provision is that a plaintiff with typical claims will pursue his or her own self-interest in the litigation and in so doing will advance the interests of the class members, which are aligned with those of the representative. *See* NEWBERG & CONTE § 3.13, at 3-74 - 3-75.

The adequate representation requirement is determined pursuant to a two-pronged test. First, the representative parties must appear able to prosecute the action vigorously through qualified counsel. Secondly, the representatives must not have antagonistic or conflicting interests with the unnamed members of the class. *See Lerwill v. Inflight Morion Pictures, Inc.*, 582 F. 2d 507, 512 (9th Cir. 1978). *See also General Tel. Co. of Southwest*, 457 U.S. at 157 n.13 ("the adequacy of representation requirement . . . also raises concerns about the competency of class counsel and conflicts of interest"). The second element of the adequate representation requirement significantly overlaps with the typicality requirement, and the sphere of interdependence between the two is readily apparent under the facts of this case.

Relying upon Plaintiffs' depositions and their association with the National Right to Work Legal Defense Foundation (the "Foundation"), United Academics argues that both Professor Carlson and Professor Morack are atypical from other nonmembers in that they believe union representation is entirely unnecessary at post-secondary educational institutions. Given their personal opposition to union representation, United Academics argues that Plaintiffs present a potential conflict of interest with other persons in the putative class. United Academics' argument is based primarily on the reasoning set out in *Gilpin v. American Federation of State, County and Municipal Employees, AFL-CIO*, 875 F.2d 1310 (7th Cir.), *cert. denied*, 493 U.S. 917 (1989).

In *Gilpin*, nine nonunion state employees brought suit challenging the adequacy of the notice they received requesting agency fees, as well as the propriety of the agency fee assessment. The plaintiffs sought to certify a class of 10,000 nonmembers. Judge Posner, affirming the district court's denial of class certification, stated:

> A potential serious conflict of interest within the class precluded the named plaintiffs from representing the entire class adequately. Two distinct types of employee will decline to join the union representing their bargaining unit. The first is the employee who is hostile to unions on political or ideological grounds. The second is the employee who is happy to be represented by a union but won't pay any more for that representation than he is forced to. The two types have potentially divergent aims. The first wants to weaken and if possible destroy the union; the second, a free rider, wants merely to shift as much of the cost of representation as possible to other workers, i.e., union members. The "restitution" remedy sought by the National Right to Work Legal Defense Foundation, which represents the nine named

> Legal Defense Foundation, which represents the nine named plaintiffs, is consistent with–and only with–the aims of the first type of employee.

Id. at 1313 (citations omitted).[3] The Seventh Circuit's reasoning is of great weight under the facts of this case. Plaintiffs have not sufficiently demonstrated that their claims are typical of the claims of the putative class, or that they will fairly and adequately protect the interests of the class. This problem is most poignantly exposed in Plaintiffs' request for punitive damages.

The Ninth Circuit has not specifically commented on the *Gilpin* decision or squarely addressed under what circumstances it is appropriate to certify a class of nonmembers challenging an agency fee. However, in *Leer v. Washington Education Association*, 172 F.R.D. 439, 444-47 (W.D. Wash. 1997), a district court devoted substantial discussion to evaluating *Gilpin's* effect under similar circumstances. The court approved certification of a class

---

[3] Other circuit courts have followed *Gilpin* and denied class action status to actions brought by nonunion members challenging agency fees. *See, e.g., Kidwell v. Transportation Communications Intern. Union*, 946 F.2d 283, 305-06 (4th Cir. 1991) (the Foundation was not an adequate litigation representative for those nonunion employees who, while not wanting to pay more than their fair share, had no desire to ruin the union or impair its ability to represent them effectively); *Pilots Against Illegal Dues v. Air Line Pilots Ass'n*, 938 F.2d 1123, 1133-34 (10th Cir. 1991) (upholding denial of class certification based on potential conflict of interest among class members as explained in *Gilpin*); *Weaver v. University of Cincinnati*, 970 F.2d 1523, 1530-31 (6th Cir. 1992), *cert. denied*, 507 U.S. 917 (1993) (plaintiffs' choice of remedies -- both punitive damages and a return of all fees assessed before the union met *Hudson's* procedural requirements -- was arguably antagonistic to the wishes of free riders and other employees, and therefore class certification of adequacy of notice claims was denied).

of nonmembers obligated to pay agency fees, but the court's approval was conditioned upon two considerations. First, the court remarked that the class was seeking primarily injunctive and declaratory relief. *See Leer*, 172 F.R.D. at 446. The court reasoned that with respect to the plaintiffs' claims for injunctive and declaratory relief, there was clearly no risk of a windfall to the plaintiffs or financial embarrassment to the union. *See id.* Second, acknowledging that the plaintiffs also sought damages, the court noted that those damages were limited to compensatory or nominal damages, plus interest. *See id.* Recognizing that the plaintiffs had not specified in their complaint the type of harm they sought to be compensated for or the amount of compensatory damages sought, the court indicated that there was therefore "some risk that plaintiffs who are hostile to the union on political and ideological grounds [might] seek damages that exceed those sought to be recovered by the free riders." *See id.* at 446-47. The court resolved this conflict of interest by permitting the plaintiffs to assert their adequacy of notice claim as a class claim "only to the extent the plaintiffs seek injunctive or declaratory relief, plus nominal damages." *See id.* at 447.

Plaintiffs in this action seek injunctive relief, declaratory relief, equitable restitution, nominal damages and punitive damages. This Court concludes that Plaintiffs' demand for equitable restitution and punitive damages gives rise to precisely the sort of conflict of interest anticipated in *Gilpin* and assiduously avoided in *Leer*. Plaintiffs attempt to deter the Court from drawing this conclusion by minimizing the significance of *Gilpin*.[4]

---

[4] Indeed, this Court notes that Plaintiffs generally treat *Gilpin* as a carelessly researched and even vindictive opinion. *See, e.g.*, Docket No. 14 at 21 n.11 (referencing the "speculative discussions contained

(continued...)

This Court, however, is of the view that *Gilpin* is a persuasive opinion deserving of a district court's serious consideration when evaluating a motion for class certification in an action brought by nonunion members challenging the collection of agency fees. Furthermore, this Court relies upon the fact that under Alaska law, any result secured in a class action would only have limited additional res judicata effect over individual judgments against United Academics. *See Pennington v. Snow*, 471 P.2d 370, 376-77 (Alaska 1970) (holding mutuality of estoppel is not as a rule necessary for the invocation of res judicata or collateral estoppel against a party in Alaska). Given the current status of this case, with United Academics all but conceding liability, no justification for recognizing a class action exists at this time.

IT IS THEREFORE ORDERED:

Plaintiffs' motion for class certification (Docket No. 14) is DENIED.

Dated at Anchorage, Alaska this 16 day of November, 1998.

/s/
JAMES K. SINGLETON, JR.
United States District Judge

---

[4] (...continued)
in *Gilpin*"); *Id.* at 24 n.12 (characterizing *Gilpin* as the "root evil" behind a "distinctly minority view"); Docket No. 18 at 12 ("Like *Gilpin*, United Academics offers only speculation.") (emphasis in original); *Id.* at 14-15 (characterizing *Gilpin* as offering "academic musings" and "defying the evidence").

APPENDIX C

ORDER GRANTING IN PART MOTION FOR SUMMARY JUDGMENT IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

16 February 1999

[Clerk's stamp omitted in printing]
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ROBERT F. CARLSON and JOHN MORACK, Plaintiffs, vs. UNITED ACADEMICS-AAUP/ AFT, AFL-CIO, Defendant.	Case No. A98-0141 CV (JKS) ORDER GRANTING IN PART MOTION FOR SUMMARY JUDGMENT

This is a civil rights lawsuit filed under 42 U.S.C. § 1983. Grounded in the First, Fifth and Fourteenth Amendments to the United States Constitution, Plaintiffs' complaint seeks injunctive relief, declaratory relief, equitable restitution, nominal damages and other relief to redress the alleged deprivation under color of Alaska law of Plaintiffs' rights. The controversy at issue relates to Defendant United Academics-AAUP/AFT, AFL-CIO's ("United Academics") allegedly unlawful demands for compliance with the "Membership, Dues Deduction, and Agency Fee" article of the collective bargaining agreement between United Academics and the University of Alaska (the "University").

Plaintiffs Robert F. Carlson and John Morack have filed a motion for summary judgment. *See* Docket Nos. 23 (Motion), 36 (Reply). Plaintiffs argue they are entitled to judgment as a matter of law because United Academics' demands for payment

of agency fees offended the notice and procedural safeguards mandated by the Supreme Court in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986). Plaintiffs further argue that United Academics' noncompliance with *Hudson's* requirements has persisted in a renewed demand for agency fees made after the initiation of this action, and that the Court should also enter judgment against United Academics in relation to its most recent demand. United Academics opposes the motion for summary judgment. *See* Docket No. 32 (Opposition). Plaintiffs have requested oral argument. *See* Docket No. 34.[1]

FACTUAL BACKGROUND

Plaintiffs Robert F. Carlson and John Morack are employees of the University at its Fairbanks campus. (Complaint ¶ 6) They are employed in a bargaining unit comprising teaching and research faculty at the University, as set forth in a collective bargaining agreement between the University and United Academics. (Complaint ¶ 6 & Exh. A) The collective bargaining agreement requires all research and teaching faculty in the bargaining unit to either maintain membership in United Academics, or, for those faculty members who have chosen to refrain from membership in United Academics, to pay mandatory "agency fees" as a condition of continued employment. (Complaint ¶ 19 Exh. A at 9)

---

[1] The Court has reviewed the record and the parties' briefing and concludes that the parties have sufficiently briefed the issues to the extent that oral argument will not be helpful. *See* D. AK. LR 7.1(i). *See also United States v. Cheely*, 814 F. Supp. 1430, 1436 n.4 (D. Alaska 1992), *aff'd*, 36 F.3d 1439 (9th Cir. 1994) (discussing oral argument in criminal context but principles remain applicable).

In mid-March 1998, United Academics, by its Treasurer C. Patrick Fort, sent a letter to Plaintiffs demanding they "provide the University with written authorization to deduct [agency] fees from your paycheck (or make an alternate arrangement for their direct payment to United Academics)." (Complaint ¶ 21 & Exh. B(1)) The letter further stated that "[t]he payment of the fees is not an option; it is mandatory so long as you work at the University of Alaska and are represented by United Academics." (Exh. B(1))

When Plaintiffs did not respond to this first demand, United Academics repeated its demand by letter dated April 21, 1998. (Complaint ¶ 24 & Exhs. C(1)-C(3)) The letter stated that "[i]f the [dues checkoff authorization] form is not received by May 1, the next correspondence you will receive will be a letter informing you that United Academics has requested that the University terminate your employment per Article 4 of the Collective Bargaining Agreement." (Exh. C(1)) The letter also stated that, unless the recipients were to authorize dues deductions by April 24, 1998, United Academics would require payment of agency fees retroactive to January 1, 1998, and that if an employee failed to authorize automatic dues deductions by April 24, 1998, the union would "seek the collection of those fees through the courts and/or a collection agency." (Exh. C(1)) Plaintiffs filed their complaint in this Court on May 5, 1998.

Thereafter, on October 12, 1998, United Academics distributed to Plaintiffs a new notice and demand, stating that "[a]gency fees pursuant to the requirements of the United States Supreme Court decision, ***Hudson v. Chicago Teachers Union*** will be initiated on November 15, 1998. Any agency fees collected prior to November 15, 1998 will be reimbursed to individual faculty members." (Docket No. 24, Exh. A at 3) Plaintiffs argue that this most recent notice and demand also fails to provide all

of the protections required by *Hudson*. Plaintiffs have not, however, filed any supplemental pleadings setting forth these allegations as the basis of their claim for relief in this Court.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when there is no genuine dispute as to material facts and the moving party is entitled to judgment as a matter of law. *See Jung v. FMC Corp.*, 755 F.2d 708, 710 (9th Cir. 1985); FED. R. CIV. P. 56. Material facts are those that may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party. *See id.* In considering a motion for summary judgment, the court may not weigh the evidence or make credibility determinations, and is required to draw all inferences in a light most favorable to the non-moving party. *See id.*

DISCUSSION

Nonunion public employees can be compelled, consistent with the Constitution, to bear only their pro rata share of the costs of collective bargaining, contract administration, and grievance adjustment. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977). However, before a union is entitled to take any action to enforce such an obligation, it must comply with "the constitutional requirements for the . . . collection of agency fees," *see Hudson*, 475 U.S. at 310, for the First, Fifth and Fourteenth Amendments require that certain notice and procedural protections be provided to public employees who have exercised their right to refrain from membership in employee organizations but

are subjected to demands for payment of agency fees when their employer agrees to such a clause in the collective bargaining agreement. *See id.*, 475 U.S. at 306.

The procedural safeguards which the government and the union have a responsibility to provide to all potential objectors are: (1) the good-faith advance reduction of the fees to no more than that portion of the union's expenditures required for its execution of its duties as the nonmembers' exclusive bargaining representative; (2) financial disclosure given prior to any demand for or collection of the reduced fee adequate to allow nonmembers to gauge the propriety of the union's fee and to make an intelligent decision whether to challenge the fee calculation before an impartial decision maker; (3) an opportunity to challenge the fee calculation before an impartial decision maker; and (4) an escrow of the amounts reasonably in dispute pending such challenges, though escrow alone is insufficient to render collection of fees constitutional. *See id.* at 305-10. These safeguards insure against both misuse of collected funds and excessive collections, and also facilitate a nonunion employee's ability to protect his or her rights. *See id.* at 310 & 307 n. 20.

1. <u>United Academics' Initial Demands For Payment Of Fees Were Unlawful</u>

In its initial demands for payment of agency fees (i.e., its mid-March and April 21, 1998 demands), United Academics clearly offended the notice and procedural safeguards mandated by *Hudson*. United Academics failed to make adequate financial disclosures concerning its own expenditures. *See Hudson*, 475 U.S. at 306 & 307 n.18. Nor did United Academics make an adequate explanation for the basis of the agency fee. *See id.* at 306. *See id.* at 306. *See also Knight v. Kenai Peninsula Borough*

Sch. Dist., 131 F.3d 807, 812 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 2060 (1998). United Academics also failed to provide any opportunity for challenging its fee calculation before an impartial decision maker. *See Hudson*, 475 U.S. at 307 & n.19.

Plaintiffs to this action have clearly demonstrated this point and shown that United Academics failed to comply with the constitutional requirements for the collection of agency fees in its initial demands for payment. United Academics agrees that its initial demands for payment were disseminated in error, and has indeed conceded this point from the very beginning of this litigation. The parties are thus in agreement that summary judgment should be entered declaring United Academics' initial demands for payment unlawful.

There is, however, substantial disagreement regarding certain other issues. United Academics maintains that this Court should refrain from entertaining Plaintiffs' additional request for judgment declaring United Academics' most recent demand for payment of agency fees invalid, pointing out that Plaintiffs have not filed any supplemental pleadings setting forth the factual foundation for this finding. There is also substantial disagreement among the parties regarding the appropriate remedy for United Academics' noncompliance with the constitutional requirements governing the collection of agency fees. Plaintiffs maintain that the Court should enter a declaratory judgment, permanent injunctive relief, nominal damages, restitution and an award of costs and attorneys fees. United Academics, on the other hand, maintains that Plaintiffs are entitled to no more than nominal damages.

2. Leave To File Supplemental Complaint

Approximately five months after this suit was filed, United Academics promulgated to Plaintiffs a new notice and procedure for the collection of agency fees. *See* Docket No. 24, Exh. A. Plaintiffs argue that this new notice is inadequate on seven different bases, and seek to challenge the new notice for failure to pass constitutional muster within the context of this action. *See* Docket No. 23 at 14-32.[2] Plaintiffs have not, however, requested to file a supplemental pleading setting forth the events which have happened since the filing of their complaint. *See* FED. R. CIV. P. 15(d). United Academics maintains that this Court cannot entertain a motion for summary judgment on a matter not properly raised in the parties' pleadings.

Federal Rule of Civil Procedure 15(d) provides that a court may permit a party to serve a supplemental pleading setting forth events that have taken place since the filing of the original pleading, thereby bringing the case up to date. In pertinent part, Rule 15(d) states:

> Upon motion of a party the court may, upon reasonable notice and upon such terms as are just permit the party to serve a supplemental pleading setting forth transactions or

---

[2] Plaintiffs cite (1) the lack of complete audit information concerning affiliate unions; (2) procedural and substantive discrimination between objectors and challengers; (3) creation of an arbitration procedure that may result in an increase in dues and fees; (4) potential future procedures that suggest constitutional deficiencies; (5) inclusion of invalid charges; (6) misinformation provided to unit employees as to the proper method of automatic deductions; and (7) failure to inform of the arbitration procedure.

occurrences or events which have happened since the date of the pleading sought to be supplemented.

The purpose of Rule 15(d) is to promote as complete an adjudication of the dispute between the parties as is possible. *See LaSalvia v. United Dairymen of Ariz.*, 804 F.2d 1113, 1119 (9th Cir. 1986), *cert. denied*, 482 U.S. 928 (1987). *See also* 6A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE §§ 1504, 1506 (2d ed. 1990). Leave to permit supplemental pleading is favored, but supplemental pleading cannot be used to introduce a separate, distinct and new cause of action. *See Planned Parenthood of S. Ariz. v. Neely*, 130 F.3d 400, 402 (9th Cir. 1997). *See also Keith v. Volpe*, 858 F.2d 467, 473 (9th Cir. 1988) ("Rule 15(d) is intended to give district courts broad discretion in allowing supplemental pleadings."), *cert. denied*, 493 U.S. 813 (1989).

Plaintiffs' attempt to secure judgment on matters that transpired after the initiation of this action without seeking leave to supplement utterly ignores the mandate of Rule 15(d). While it appears that this Court would likely grant leave to supplement under the circumstances of this case, *see, e.g., Keith*, 858 F.2d at 473 ("The clear weight of authority . . . permits the bringing of new claims in a supplemental complaint to promote the economical and speedy disposition of the controversy"), Plaintiffs cannot simply ignore the "gymnastics" of the supplemental pleading procedure, *see* Docket No. 36 at 7 n.6 ("Assuming arguendo that the union's argument had merit, Plaintiffs certainly could perform the gymnastics of seeking to file and filing a Supplemental Complaint."). Accordingly, before challenging United Academics' most recent notice and procedure for the collection of agency fees in a motion for summary judgment, Plaintiffs must seek leave to file a supplemental pleading "setting forth transactions or

occurrences or events" which have occurred since the filing of their complaint. *See* FED. R. CIV. P. 15(d).

3. Damages To Which Plaintiffs Are Entitled For United Academics' Initial Demands For Payment Of Fees

In their motion for summary judgment, Plaintiffs seek damages related to both United Academics' initial demands and most recent demand for the collection of agency fees. Even though the scope of this Court's summary judgment ruling is limited to deciding the legality United Academics' initial demands for the collection of agency fees, the Court chooses to resolve at this time the issue of damages related to that claim. Plaintiffs maintain that the mandates of *Hudson* can be fulfilled only by: (1) entry of a declaratory judgment that United Academics has not complied with "the constitutional requirements for the . . . collection of agency fees," *see Hudson*, 475 U.S. at 310; (2) entry of permanent injunctive relief against fee demands of and collections from Plaintiffs; (3) an award of nominal damages for the violations of Plaintiffs' First Amendment due process rights; and (4) an award of costs and attorney fees. *See* Docket No. 23 at 32-35.[3] United Academics, on the other hand, while conceding its liability related to its initial demands for collection of agency

---

[3] In their motion for summary judgment, drafted prior to the issuance of this Court's order denying Plaintiffs' motion for class certification, an award of restitution of all fees illegally collected from nonmembers was also requested. However, neither Carlson or Morack has paid any fees to United Academics since the collective bargaining agreement went into effect in March 1998. Thus, in view of this Court's having denied the motion for class certification, Plaintiffs' request for equitable restitution in this action is moot.

fees, maintains that Plaintiffs are entitled to no more than nominal damages. *See* Docket No. 32 at 2-4.

Plaintiffs' request for entry of a declaratory judgment seems reasonable even if redundant. United Academics has offered no specific objection to the entry of declaratory judgment. The Declaratory Judgment Act authorizes federal courts to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought[,]" with "the force and effect of a final judgment or decree[.]" *See* 28 U.S.C. § 2201. A court considering granting declaratory relief is to consider "whether a judgment will clarify and settle the legal relations at issue and whether it will afford relief from the uncertainty and controversy giving rise to the proceedings." *See Natural Resources Defense Council, Inc. v. United States Envtl. Protection Agency*, 966 F.2d 1292, 1299 (9th Cir. 1992). In this case, Plaintiffs' First Amendment rights are at stake and the entry of declaratory judgment will provide guidance to United Academics for future crafting of agency fee requests.

It does not appear, however, that this would be an appropriate action for the Court to grant permanent injunctive relief against agency fee demands of and collections from Plaintiffs. It is clear that United Academics cannot collect an agency fee from either Plaintiff until proper notice is given. Plaintiffs have not been threatened with termination by United Academics or the University, and public employers such as the University are forbidden from terminating any faculty member for nonpayment of agency fees until the demanding union confirms to the employer's satisfaction that it has complied with the requirements of *Hudson*. *See Knight*, 131 F.3d at 817. The granting of permanent injunctive relief in favor of Plaintiffs against United Academics would essentially be premised upon the prevention of conduct which United Academics is powerless to cause.

Moreover, an injunction is an equitable remedy that does not issue as a matter of course. Plaintiffs have made no showing that they have no adequate remedy at law and will suffer irreparable injury if denied injunctive relief. *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987) ("The basis for injunctive relief is irreparable injury and inadequacy of legal remedies."). Injunctive relief is only proper if monetary damages or other legal remedies will not compensate the plaintiffs for their injuries. *See LaDuke v. Nelson*, 762 F.2d 1318, 1330 (9th Cir. 1985). Plaintiffs are represented by a national foundation devoted to employment and labor law issues, and as demonstrated by the request for relief set forth in this action, agency fees collected in noncompliance with *Hudson* are routinely returned to nonunion employees.

Any judicial determination regarding Plaintiffs' request for costs and attorney fees shall be deferred until a final judgment is entered in this action. *See* D. AK. LR 54.3. Accordingly, the Court concludes that Plaintiffs are entitled to nominal damages and declaratory relief for United Academics' unlawful initial demands for payment and collection of agency fees.

IT IS THEREFORE ORDERED:

Plaintiffs' motion for summary judgment (**Docket No. 23**) is **GRANTED IN PART AND DENIED IN PART**. This Court finds as a matter of law that United Academics' initial demands for payment of agency fees offended the notice and procedural safeguards mandated by the Supreme Court in *Hudson*. In relation to this ruling, the Court will ultimately issue a declaratory judgment stating that United Academics' initial demands violated the Constitution, and also award Plaintiffs nominal damages.

Plaintiffs' motion for summary judgment is denied without prejudice, however, as it relates to United Academics' notice and procedure for the collection of agency fees issued subsequent to the initiation of this action. If Plaintiffs wish to challenge United Academics' most recent demand for the payment and collection of agency fees, they must first request leave to file a supplemental pleading setting forth the events which have transpired since the filing of their complaint. Any such request shall be filed in this action on or before **Thursday, March 18, 1999**. If a request for leave to file a supplemental pleading is not made by that time, judgment shall be entered disposing of this action in accordance with the terms of this order.

Dated at Anchorage, Alaska, this 16 day of February, 1999.

/s/
JAMES K. SINGLETON, JR.
United States District Judge

APPENDIX D

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

10 February 2000

[Clerk's stamps omitted in printing]
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ROBERT F. CARLSON, *et al.*, Plaintiffs. vs. UNITED ACADEMICS-AAUP/AFT/APEA, AFL-CIO, Defendant.	Case No. A98-0141 CV (JKS) ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This is a civil rights lawsuit filed under 42 U.S.C. § 1983 seeking redress for alleged violations of the First, Fifth and Fourteenth Amendments to the United States Constitution. The controversy relates to demands set forth in an article of the collective bargaining agreement between Defendant United Academics-AAUP/AFT/AFT, AFL/CIO ("United Academics" or "the Union") and the University of Alaska, Fairbanks ("University"). The dispute centers on whether United Academics' demand for agency fees complies with the notice and procedural safeguards discussed by the United States Supreme Court in

Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson, 475 U.S. 292 (1986).

In an order issued on February 16, 1999, the Court concluded that the demand for payment which initiated this lawsuit did not comply with the *Hudson* safeguards. *See* Docket No. 37. However, while United Academics changed its demand following the institution of the lawsuit by Plaintiffs Robert F. Carlson and John Morack ("Plaintiffs"), Plaintiffs did not discuss the changed demand in their complaint. The Court therefore did not reach the issue of whether United Academics' renewed demand also violated *Hudson* and concluded that Plaintiffs must seek leave to file a supplemental pleading "setting forth the events which have transpired since the filing of their complaint." *See id.* at 12.

Plaintiffs filed a Supplemental Class Action Complaint at Docket No. 40 and have now renewed their motion for summary judgment, which is currently ripe. *See* Docket Nos. 41 (motion); 53 (opposition); 55 (reply). Defendants have filed a cross motion for partial summary on Plaintiffs' claims for punitive damages, indemnification and injunctive relief, *see* Docket Nos. 57 (motion), which Plaintiffs partially oppose, 59 (opposition). *See also* Docket Nos. 63 (reply); 42 (Plaintiffs' statement of undisputed material facts).[1]

---

[1] Oral argument has been requested by both parties. The Court concludes that oral argument would not assist its resolution of the issues presented by the parties motions. *See United States v. Cheely*, 814 F. Supp. 1430, 1438-39 (D. Alaska 1992) (Singleton, J.) (discussing oral argument in a criminal context). *See also* D. AK. L.R. 7.1(i).

FACTS

Plaintiffs are employees of the University of Alaska, Fairbanks ("University"). As required by AS 23.40.110 and as set forth in the collective bargaining agreement between the University and United Academics, Plaintiffs are part of a bargaining unit comprised of all regular non-adjunct teaching and research professors at the University. The collective bargaining agreement requires all research and teaching faculty in the bargaining unit either to maintain membership in United Academics or, for those faculty members who have chosen to refrain from membership in the Union, to pay mandatory "agency fees" as a condition of continued employment.[2] In mid-March, 1998, United Academics sent a letter to Plaintiffs demanding that they "provide the University with written authorization to deduct [agency] fees from your paycheck (or make alternate arrangements for their direct payment to United Academics)." The letter further provided that "[t]he payment of the fees is not an option; it is mandatory so long as you work at the University of Alaska and are represented by United Academics."

When Plaintiffs did not respond to the Union's first demand, United Academics repeated its demand in a letter dated April 21, 1998: "[i]f the [dues authorization] form is not received by May 1, the next correspondence you will receive will be a letter informing you that United Academics has requested that the University terminate your employment per Article 4 of the Collective Bargaining Agreement." This second letter also stated that unless recipients authorized dues deductions by April 24,

---

[2] Nonunion professors are referred to herein as "agency fee payers," "dissenters" or "objectors."

1998, United Academics would require payment of agency fees retroactive to January 1, 1998, and that if an employee failed to authorize automatic dues deductions by April 24, 1998, the Union would "seek the collection of those fees through the courts and/or a collection agency." Plaintiffs filed their initial complaint in this Court on May 5, 1998.

On October 12, 1998, United Academics distributed to Plaintiffs a new notice and demand, which provided that "[a]gency fees pursuant to the requirements of the United States Supreme Court decision, *Hudson v. Chicago Teachers Union* will be initiated on November 15, 1998. Any agency fees collected prior to November 15, 1998 will be reimbursed to individual faculty members." *See* Docket No. 40, Exh. D ("October mailing"). By a letter dated December 1, 1998, United Academics sent to Plaintiffs documents that were "inadvertently omitted from the material accompanying the Hudson v. Chicago Teachers Union notice." *See id.*, Exh. E ("December mailing"). Following the Court's ruling at Docket No. 37, it is only the material in the October mailing as supplemental by the December attachments that is at issue here.

DISCUSSION

1. Plaintiffs' Motion for Summary Judgment

While union shop agreements are not unconstitutional, the Supreme Court has long held that unions may not force nonmembers to support the union's political or other ideological causes. *See, e.g., Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *International Assoc. of Machinists v. Street*, 367 U.S. 740 (1961); *Dean v. Trans World Airlines, Inc.*, 924 F.2d 805 (9th Cir. 1991). Rather, unions may collect money from nonmem-

bers only to "defray the expenses . . . of collective agreement, [and] the expenses entailed in the adjustment of grievances and disputes." *See Street*, 367 U.S. at 768. In *Hudson*, the Supreme Court set forth the procedures a union must follow when collecting the nonmembers' pro rata share of representation costs. *See* 475 U.S. at 310. The *Hudson* Court reaffirmed prior rulings that under union shop agreements, every employee may be required "to pay a service fee to defray costs of collective bargaining, contract administration, and grievance adjustment," but noted that constitutional freedom of speech, due process and freedom of association concerns prohibited unions from "collect-[ing] from dissenting employees any sums for the support of ideological causes not germane to its duties as collective bargaining agent." *See* 475 U.S. at 294 (quotation omitted). The Court held that the procedural requirements for the union's collection of agency fees "include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *See id.* at 310. "The objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective bargaining activities." *See id.* at 302 (quoting *Abood*, 431 U.S. at 237). The Ninth Circuit has described the three requirements as "the minimum procedural protections for collection of agency fees." *See Knight v. Kenai Peninsula Borough Sch. Dist.*, 131 F.3d 807, 810 (9th Cir. 1997). In cases such as this the union bears the burden of demonstrating what portion of its expenses are devoted to functions other than those that can be charged to dissenting employees. *See Prescott v. County of El Dorado*, 177 F.3d 1102, 1105-06 (9th Cir. 1999) (citing

Brotherhood of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employes v. Allen, 373 U.S. 113, 122 (1963)).

A. Should the Court consider the December mailing as part of the notice?

As the Union concedes, United Academics failed to include information about its affiliates in the October mailing. *See* Docket No. 53 at 4 n.1 ("United Academics learned that the audits of its affiliates, AAUP, AFT, and APEA/AFT, intended for attachment to the Notice document, may have been inadvertently left out."). However, the affiliate material was mailed to all objectors in the December mailing. The parties dispute whether the subsequent mailing cures, and therefore moots, the admitted deficiencies of the October mailing. Many of Plaintiffs' arguments in the renewed motion for summary judgment are premised on the insufficiency of the October mailing, without reference to the material provided in the December mailing. As discussed below, the Court will determine the sufficiency of the notice provided to Plaintiffs based on the information provided to Plaintiffs in both the October and December mailings.

With its October mailing, United Academics attached a document titled "Schedule of Expenses and Allocation between Chargeable and Nonchargeable Expenses," which disclosed that United Academics made payment to the American Association of University Professors ("AAUP"), American Federation of Teachers ("AFT") and Alaska Public Employees Association/AFT ("APEA/AFT").[3] *See* Docket No. 42, Exh. D(7). In the Decem

---

[3] United Academics also makes payments to the state and national AFL-CIO, but Plaintiffs note that the AFL-CIO payments do

(continued...)

ber mailing, United Academics disclosed that it had inadvertently omitted information about the affiliates, and provided Plaintiffs copies of the American Arbitration Association's Rules for Impartial Determination of Union Fees, the AAUP's "Allocation of Expenses -- Fee Rebate," the AFT's statement discussing "allocation between chargeable expenses and non-chargeable expenses," and the APEA/AFT's independent auditor's report discussing chargeable and nonchargeable expenses. *See* Docket No. 53, Exh. 3 (with attachments).

In *Hudson*, the Supreme Court rejected an argument that a union's alteration of its notice procedures after trial had mooted alleged deficiencies in the union's notice procedures. *See* 475 U.S. at 1075 n.14. According to the Court, "voluntary cessation of allegedly illegal conduct does not moot a case;" concern that the defendant would return to its illegal ways if the Court dismissed the suit as moot "dictate that we review the legality of the practice defended before the district court." *See id.* (internal quotation omitted). *Cf., Weaver v. University of Cincinnati*, 942 F.2d at 1042 (same). Here, Defendant has conceded that its notice was inadequate before the December mailing, so there is little concern that Defendants would fail to provide complete notice in the future. Additionally, Plaintiffs have provided no reason why the

---

[3] (...continued)
not implicate *Hudson*, and are not an issue here, because United Academics treats those payments as nonchargeable to dissenters. *See* Docket No. 41 at 4-5 n.4. While Plaintiffs argue in their reply brief that a *Hudson* violation occurred because United Academics did not reveal that it treats payments to the AFL-CIO as nonchargeable until the December mailing, *see* Docket No. 55 at 6, they did not make the argument in their initial motion, *see* Docket No. 41 at 4-5 n.1. Additionally, the December mailing cured any deficiency.

Court should review a procedure that United Academics admitted was both insufficient and incomplete and has since amended. For the sake of efficiency as well as fairness, the Court will review the final notice provided Plaintiffs.

The Ninth Circuit's decision in *Knight* supports the conclusion that the Court should review the notice as amended by United Academics' December mailing. There, the district court rejected a *Hudson* violation claim by nonunion teachers, concluding that a letter which contained no breakdown of chargeable and nonchargeable expenses was mooted by a subsequent letter which stated that the breakdown would be provided in the future. *See* 131 F.3d at 810. The Ninth Circuit rejected the district court's conclusion that the subsequent letter "cured" the initial violation, concluding that the subsequent letter was not a *Hudson* notice "as it failed to provide any breakdown between chargeable and nonchargeable expenses." *See id.* at 811-12. The court held that the subsequent letter was constitutionally defective because "it sought to collect representation fees without providing a reasonable explanation of the basis for the fee." *See id.* at 812. Here, while Defendants challenge the adequacy of the *Hudson* material as amended by the December mailing, they do not vigorously contend that the material was a demand for fees rather than an attempt to provide *Hudson* notice.

B. Was United Academics' explanation for the basis of fees satisfactory?

Plaintiffs' first challenge to the adequacy of United Academics' notice is that the disclosure insufficiently detailed contributions made to United Academics' affiliates. Plaintiffs argue that the affiliate disclosures violate the *Hudson* requirements for two reasons: first, Plaintiffs argue that the discussion of payments

made to AAUP are confusing, and second, that United Academics treats as chargeable certain payments which its affiliates treats as nonchargeable. *See* Docket No. 41 at 5. As discussed below, United Academics committed no *Hudson* violations with regard to the notice it provided about its affiliates.

1. Was the disclosure related to AAUP and AAUP CBC a *Hudson* violation?

Plaintiffs argue that United Academics' explanation of payments made to the AAUP and the AAUP CBC is confusing, stating that United Academics does not explain "why the AAUP and the AAUP CBC were treated as separate line items in its notice." *See* Docket No. 41 at 5. *See also* Docket No. 55 at 6-7 (same). It appears that one of the attachments to the October mailing explains the difference. The "Breakdown of United Academics AAUP/AFT Expenses by General Ledger Categories" explains that donations to AAUP were 23% chargeable based on the national affiliate's determination. *See* Docket No. 42, Exh. D(6) at 2. United Academics provided an audit of AAUP's determination in its December mailing. *See* Docket No. 53, Exh. 3 at 5 ("American Association of University Professors Allocation of Expenses-Fee Rebate"). According to the breakdown, the AAUP CBC contribution is 100% chargeable because "AAUP's primary mission is not collective bargaining. Those AAUP chapters that are involved in collective bargaining must join the Collective Bargaining Congress (CBC)." *See id.* It appears therefore that AAUP and the AAUP CBC were treated as separate line items because they perform different functions, with only some of AAUP's activities chargeable while all of AAUP CBC's activities are related to collective bargaining. United

Academics' disclosure with relation to its affiliates did not run afoul of the Supreme Court's decision in *Hudson*.

2. Is there a discrepancy between United Academics' and the AAUP's chargeability determination?

Plaintiffs also argue that AAUP's audited disclosure shows that United Academics treats payments made to AAUP CBC as 100% chargeable while AAUP treated the same expenditures as 100% nonchargeable. However, based on the exhibits cited by the Plaintiffs, no discrepancy exists.

Plaintiffs cite the United Academics AAUP/AFT 1998 Agency Fee Report and the United Academics-AAUP/AFT "Schedule of Expenses and Allocation between Chargeable and Nonchargeable Expenses" to demonstrate that United Academics treated payments to AAUP CBC at 100% chargeable. *See* Docket No. 41 at 5 (citing Docket No. 40, Exh. D(6) at 2 and 5, & Exh. D(7) at 3). Both documents provide that United Academics treated the $1,430 in AAUP CBC funds as 100% chargeable. *Compare* Docket No. 40, Exh. D(6) at 2 and 5, *with id.*, Exh. D(7) at 3. To support the argument that AAUP treated the same expenditures as nonchargeable to objectors, Plaintiffs cite page nine of Exhibit 3 of Defendants' opposition to Plaintiff's initial motion for summary judgment. *See id.* at 5. *See also* Docket No. 55 at 7 (same citation in reply brief). At page nine of Exhibit Three, the AAUP sets forth its "allocation of Expenses -- Fee Rebate for the Year Ended December 31, 1997. *See* Docket Nos. 53, Exh. 3 at 9. There, the costs allocated to the collective bargaining congress are listed within the column titled "Chargeable to Objectors." *See id.* It appears therefore that there is no

discrepancy between the United Academics' and the AAUP's treatment of the AAUP CBC payment.

C. Does United Academics discriminate between challengers and objectors?

According to the notice form provided to Plaintiffs with the October mailing, the objection system operates as follows: "Promptly after May 1 of each fiscal year," United Academics will prepare a list of the bargaining unit's employees who were agency fee payers as of May 1. *See* Docket No. 24, Exh. A at 9. Employees who objected to paying full union dues are offered two options, referred to as "Class I" and "Class II" objections. *See id.* at 14-15 (reproducing October mailing, with forms describing Class I and Class II objections systems). Plaintiffs contend that the two-class objection system discriminated against Class II objectors.

According to the definition of terms provided by United Academics, "'Class I Objecting Agency Fee payer' means an employee in a collective bargaining unit who (1) does not choose to join the United Academics, AAUP/AFT; (2) objects to the use of his or her service fee for uses unrelated to collective bargaining, contract administration and grievance adjustment; and (3) accepts the reduced Agency Fee as determined by the United Academics, AAUP/AFT . . . ." *See* Docket No. 24, Exh. A at 8. Under the program offered to Plaintiffs, Class I objectors would accept United Academics' determination that for the 1998-1999 fiscal year that "the reduced agency fee amount will be 1.09% of [the objector's] salary with at $626.40 maximum." *See id.* at 14. Once United Academics received notice of a Class I objection, the Union would issue a rebate of the total amount collected in excess of the agency fee as determined by United Academics and agreed

to by the agency fee payer. *See id.* at 10. "Further refunds will be made in advance of the dues being deducted or the monthly dues deducted will be reduced to the appropriate amount." *Id.* Class I objectors waive their right to challenge the amount of the fee before an impartial arbitrator and may not have their fees reduced based on the outcome of another objector's arbitration. *See id.* at 10-11.

"Class II Objecting Agency Fee payer" is defined as "an employee in the collective bargaining unit who (1) does not choose to join the United Academics, AAUP/AFT; (2) objects to the use of his or her service fee for uses unrelated to collective bargaining, contract administration and grievance adjustment; and (3) objects to the reduced service fee as determined by United Academics, AAUP/AFT." *See id.* Under the program offered to Plaintiffs, the Class II objector would "request than an impartial arbitrator promptly hear [the objector's] challenge." *See id.* If United Academics received a timely objection, the Union would request that the American Arbitration Association ("AAA") appoint an independent arbitrator "to hold a hearing to determine the percentage of the United Academics, AAUP/AFT budget for the service fee year that will be expended for chargeable activities." *See id.* at 6. The objector are required to agree that

> I understand that the arbitrator may either approve the United Academics, AAUP/AFT calculations and increase or decrease the amount attributable to "non-chargeable" activities. I understand that the full amount of the Agency fee United Academics, AAUP/AFT receives will be retained in an interest-bearing escrow account, until the arbitrator decides the challenge. United Academics, AAUP/AFT will therefore transmit to me the amount of the fee attributable

to "non-chargeable" activities as determined by the arbitrator plus interest as appropriate.

See id. at 15. If the arbitrator concludes that the Union overcharged objectors, United Academics would "pay to each [Class II] employee in a single lump sum the total excess amount that has been deducted to date. Further refunds will be made in advance of dues being deduced or a reduc 1 payroll deduction amount will be instituted . . . ." *See id.* at 7-8.

Plaintiffs argue that the Class II objection system is so burdensome as to discourage dissenters from joining Class II, thereby chilling their constitutional rights by requiring them to pay full union dues into an interest bearing escrow account pending the arbitrator's decision, while Class I objectors receive an "immediate advance reduction." *See* Docket No. 41 at 6. First, Plaintiffs appear to make a significant mistake about what agency fee payers must contribute. Especially in light of Plaintiffs' error, it appears that the Class II system does not chill dissenters' rights.

Plaintiffs argue that those dissenters who opt for the Class II procedures will be required to pay full union dues while Class I dissenters must only pay the Union's estimate of agency fee payers' pro rata share of expenses. *See, e.g.*, Docket No. 55 at 8-9. Specifically, Plaintiffs appear to interpret the term "Agency Fee" as used in United Academics' document as equivalent to "full union dues." In their renewed motion for summary judgment, Plaintiffs argue that United Academics' October mailing made clear "that the full Agency fee is full union dues." *See* Docket No. 55 at 8 (citing United Academics' "Notice Re: United Academics, AAUP/AFT Agency fee for 1998-99" at Docket No. 24, Exh. A at 4) (internal quotation marks omitted). However, nothing in the document cited by Plaintiffs supports their interpretation. First, the "Definition" section of the document defines "Agency Fee" as "the fee that an employee in the bargaining unit who does

not become a member of the United Academics, AAUP/AFT is required to pay United Academics, AAUP/AFT to offset his or her per capita share of the cost of union activities." *See* Docket No. 24, Exh. A at 4. Second, the section cited by Plaintiffs, when read in context, clearly demonstrates that "full union dues" and "agency fees" are distinct. According to the same page of the same document relied on by Plaintiffs.

> Under the terms of the collective bargaining agreement between your employer and the United Academics, AAUP/AFT . . . you are required *either* to become a member of the United Academics, AAUP/AFT and pay regular United Academics, AAUP/AFT dues *or* a nonmember of the United Academics, AAUP/AFT, and pay the United Academics, AAUP/AFT an agency fee.

See Docket No. 24, Exh. A at 4 (emphasis added). Later on the same page, the text relied on by Plaintiffs appears. However, nothing in the material refers to "union dues." *See id.* Plaintiffs misread the material and inappropriately equated "agency fees" and "union dues." Additionally, there appears nothing improper about the two-tiered system by which agency fee payers pay United Academics their pro rata share of representational costs.

The *Hudson* Court concluded that the Constitution requires, at a minimum, that a procedure to determine dissenters' pro rata share of a union's collective bargaining expenditures must provide "for a reasonably prompt decision by an impartial decisionmaker." *See* 475 U.S. at 307. "The nonunion employee, whose First Amendment rights are affected by the agency shop itself and who bears the burden of objecting, is entitled to have his objections addressed in an expeditious, fair, and objective manner." *See id.* The Ninth Circuit addressed *Hudson* procedures in *Grunwald v. San Bernardino City Unified School District*, 994 F. 2d 1370 (9th Cir. 1993). According to the *Grunwald* court, a

system where full union dues are removed and the objecting employee bears the burden of seeking a refund potentially burden employees' constitutional rights

> unless the procedure serves a legitimate purpose and is administered in a fair and impartial fashion. Requiring agency fee payers to go through the inconvenience, embarrassment and delay of recovering even a small sum -- practically a sum so small it's hardly worth the hassle -- is a burden they cannot be required to bear, unless there's a compelling reason for requiring it and the procedure itself is reasonable.

See id. at 1375. The court noted a preference for identifying nonunion members early enough so that the deduction-escrow-refund procedure was unnecessary. *See id.* In the alternative, "[t]o employ the more cumbersome and intrusive deduction-escrow-refund procedure, the union must provide an 'adequate explanation,' which we interpret to mean that the union must show that the preferred method of doing things is impossible or, at any rate, far more costly and cumbersome." *Id.*[4]

The procedure here appears very much like that at issue in *Grunwald*. There, a school district deducted one-tenth of annual union dues for each of the ten months the teachers worked, regardless of whether the teacher was in the union or not. The

---

[4] The *Grunwald* court also held that "where a deduction-escrow-refund procedure is employed, the refund procedure must be reasonably prompt; the employee must be given sufficient information from which to judge the adequacy of the refund; and, if the challenging employee so chooses, the amount of the refund must ultimately be decided by an impartial decisionmaker." *See* 994 F.2d at 1375-76. Because Plaintiffs challenge to United Academics' system implicates none of these issues, they are not addressed here.

union members' deductions were sent to the unions; the agency fee payers' deductions were placed in an interest-bearing escrow account pending completion of the refund procedure. *See* 994 F.2d at 1372-73. As discussed above, the estimated agency fee at issue here is also sent to an interest-bearing escrow account. To receive a refund, nonmembers in *Grunwald* were required to submit a letter objecting to the union's discretionary use of fees and then request a refund through one of two methods: either accept the union's calculations or dispute the union's calculations and request that an arbitrator decide the percentage of the refund. *See id.* at 1373. The same procedures exist under the facts of this case.

Plaintiffs in *Grunwald* challenged the procedures, claiming that the union may not deduct more than what it is entitled, even temporarily. After evaluating the union's justification for the deduction-escrow-refund procedure, the court ruled that employees' constitutional rights had not been violated.

> Ideally, of course, the union would collect from nonmembers only that amount used for representational purposes. But that is not so easy to accomplish in practice. Here, the union has advanced a legitimate reason for the procedure it has adopted: Its ranks and the ranks of agency fee payers change from year to year. Mindful of this fact, the union has come up with a procedure that strikes a proper balance between the union's right to charge fees for collective bargaining activities and the plaintiffs' First Amendment right to be free from forced contribution to causes with which they disagree. Tyranny of the majority this is not.

See id. at 1377. *Cf. Knight*, 131 F.3d at 812 (explaining the ruling in *Grunwald* by noting that "as a practical matter, the union could not reasonably identify teachers until after they had begun work for the academic year"). Likewise, sufficient

justifications exists here to conclude that the deduction-escrow-refund procedure serves a "legitimate purpose."

Here, the Union notes that like the teachers at issue in *Grunwald*, "the primary academic year for the University commences in September, and almost all faculty return to work at the time. Their individual salaries do not go info effect until they return, and they cannot be contacted to determine if they object, or just wish to pay the reduced-amount agency fee." *See* Docket No. 53 at 10. United Academics also notes that the program at issue here is just beginning, and that none of the professors here have paid any agency fees to date.

D. Is the arbitrator's ability to increase the agency fee unconstitutional?

Another aspect of the Class II objection system to which Plaintiffs object is that anyone entering the system agrees that "I understand that the arbitrator may either approve the United Academics, AAUP/AFT calculations and ***increase or decrease*** the amount attributable to 'non-chargeable' activities." *See* Docket No. 24, Exh. A at 15 (emphasis added). Plaintiffs argue that a system which allows the arbitrator to increase the agency fee violates the *Hudson* requirements and is fundamentally unfair. This Court disagrees. The *Hudson* Court concluded that union procedures must "provide for a reasonably prompt decision by an impartial decisionmaker." *See* 475 U.S. at 1076. The Supreme Court emphasized that the purpose of requiring a prompt and impartial decision was to guarantee that nonunion employees have their objections addressed "in an expeditious, fair, and objective manner." *See id.* Nothing about United Academics' Class II system threatens the "expeditious, fair, and objective" nature of the arbitrators' independent review.

Plaintiffs' strongest argument appears to be that allowing an arbitrator the ability to increase the agency fee could chill agency fee payers' decision to challenge United Academics' fee determination. The argument, however, follows reasoning employed by the Massachusetts Labor Relations Committee, the discussion of which is unhelpful given procedural differences between the cases. *See* Docket No. 41 at 10 & *id.*, Attach. A (*In re Springfield Educ. Assoc.*, Case No. ASF-2143, *et al.*, (Mass. Labor Relations Comm. May 11, 1993)). In *Springfield Education Association,* the panel rejected a union's interlocutory appeal of a hearing officer's decision to rely on certain expenses in justifying the union's agency service fee. Initially, the union had not included the expenses at issue in its fee demand; later, the union sought reimbursement for the expenses. The Commission affirmed the hearing officer's decision:

> The [union] asks the Commission to sanction a procedure in which the union tells its fee payers at the time of the fee demand that it will charge them for one category of expenses, but not charge them for another. Later, however, after the time for challenging the fee has passed, the union alters the categories of expenses for which it charges the fee payers not because it made a good faith mistake in calculating the fee, but because it has concluded that it cannot prove the fee through one category of expenses and must, instead, introduce another category of expenses to substantiate the amount of the fee.

See id. at 6. The Commission concluded that such a mid-stream change of course was inappropriate.

> To permit unions to revise the basis of their fee demands during litigation, after demands have been served and after the time for challenge has passed, turns the agency service fee demand on its head. The purpose of the litigation at the

Class II system threatens the "expeditious, fair, and objective" nature of the arbitrators' independent review.

Plaintiffs' strongest argument appears to be that allowing an arbitrator the ability to increase the agency fee could chill agency fee payers' decision to challenge United Academics' fee determination. The argument, however, follows reasoning employed by the Massachusetts Labor Relations Committee, the discussion of which is unhelpful given procedural differences between the cases. *See* Docket No. 41 at 10 & *id.*, Attach. A (*In re Springfield Educ. Assoc.*, Case No. ASF-2143, *et al.*, (Mass. Labor Relations Comm. May 11, 1993)). In *Springfield Education Association,* the panel rejected a union's interlocutory appeal of a hearing officer's decision to rely on certain expenses in justifying the union's agency service fee. Initially, the union had not included the expenses at issue in its fee demand; later, the union sought reimbursement for the expenses. The Commission affirmed the hearing officer's decision:

> The [union] asks the Commission to sanction a procedure in which the union tells its fee payers at the time of the fee demand that it will charge them for one category of expenses, but not charge them for another. Later, however, after the time for challenging the fee has passed, the union alters the categories of expenses for which it charges the fee payers not because it made a good faith mistake in calculating the fee, but because it has concluded that it cannot prove the fee through one category of expenses and must, instead, introduce another category of expenses to substantiate the amount of the fee.

See id. at 6. The Commission concluded that such a mid-stream change of course was inappropriate.

> To permit unions to revise the basis of their fee demands during litigation, after demands have been served and after

E. Does the provision discussing future disclosure violate *Hudson's* procedures?

The parties debate whether the future disclosure discussed in the October mailing satisfies *Hudson*, with Plaintiffs claiming that disclosure would be insufficient and United Academics contending that the issue is not ripe. It appears that both parties are correct to some degree.

In the October mailing, United Academics described the procedure for objectors to follow, providing that "prior to June 1" of the fiscal year, the Union will provide to each agency fee payer a copy of the Union's budget projecting upcoming expenditures, the AAA Rules for Impartial Determination of Union Fees, and a Notice of Class I Objection Form. *See* Docket No. 24, Exh. A at 9. According to the Union's regulations, objections must be postmarked or delivered no later than June 30. *See id.* at 10. United Academics' rules apparently do not require that it provide agency fee payers with the audited information about its affiliates or with the Class II objection form. Plaintiffs appear correct that the notice is inadequate. While noting that "absolute precision in the calculation of the charge to nonmembers cannot be expected or required," the Supreme Court indicated that the constitutional minimum notice required for disclosure related union affiliates "surely would include the major categories of expenses, as well as verification by an independent auditor." *See Hudson*, 475 U.S. at 307 n.18 (internal alterations, quotation marks and citation omitted). The material does not provide audited affiliate information, nor does it alert potential objectors of the existence of mediation. United Academics is, however, correct that the future disclosure about which Plaintiffs complain has not yet occurred. While Defendants strongly overstate the "constantly evolving" nature of the

E. Does the provision discussing future disclosure violate *Hudson's* procedures?

The parties debate whether the future disclosure discussed in the October mailing satisfies *Hudson*, with Plaintiffs claiming that disclosure would be insufficient and United Academics contending that the issue is not ripe. It appears that both parties are correct to some degree.

In the October mailing, United Academics described the procedure for objectors to follow, providing that "prior to June 1" of the fiscal year, the Union will provide to each agency fee payer a copy of the Union's budget projecting upcoming expenditures, the AAA Rules for Impartial Determination of Union Fees, and a Notice of Class I Objection Form. *See* Docket No. 24, Exh. A at 9. According to the Union's regulations, objections must be postmarked or delivered no later than June 30. *See id.* at 10. United Academics' rules apparently do not require that it provide agency fee payers with the audited information about its affiliates or with the Class II objection form. Plaintiffs appear correct that the notice is inadequate. While noting that "absolute precision in the calculation of the charge to nonmembers cannot be expected or required," the Supreme Court indicated that the constitutional minimum notice required for disclosure related union affiliates "surely would include the major categories of expenses, as well as verification by an independent auditor." *See Hudson*, 475 U.S. at 307 n.18 (internal alterations, quotation marks and citation omitted). The material does not provide audited affiliate information, nor does it alert potential objectors of the existence of mediation. United Academics is, however, correct that the future disclosure about which Plaintiffs complain has not yet occurred. While Defendants strongly overstate the "constantly evolving" nature of

fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *See id.* United Academics "need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor." *See id.* at 307 n.18. With regard to affiliated state and national labor organizations, adequate disclosure requires "either a showing that none of [the expenditure to affiliates] was used to subsidize activities for which nonmembers may not be charged, or an explanation of the share that was so used . . . ." *See id.*

F. Are specific items listed by United Academics "chargeable" to agency fee payers?

Plaintiffs dispute the chargeability of two expenses: first, a $662.00 charge for trying to convince nonmembers to join United Academics; second, a charge for death benefits which they are not eligible to receive. It appears that these complaints are well-founded.

First, United Academics included among its "chargeable expenses" a $662 entry listed as a "membership drive." *See* Docket No. 24, Exh. A at 23. The Supreme Court has emphasized that a balance must be struck between dissenters' constitutional rights not to be compelled to speak or associate with causes the dissenters do not support and a union's ability to collect the costs attributable to its collective bargaining activities. "[T]he objective must be to devise a way of preventing compulsory subsidization of ideological activities by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining

fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *See id.* United Academics "need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor." *See id.* at 307 n.18. With regard to affiliated state and national labor organizations, adequate disclosure requires "either a showing that none of [the expenditure to affiliates] was used to subsidize activities for which nonmembers may not be charged, or an explanation of the share that was so used . . . ." *See id.*

F. Are specific items listed by United Academics "chargeable" to agency fee payers?

Plaintiffs dispute the chargeability of two expenses: first, a $662.00 charge for trying to convince nonmembers to join United Academics; second, a charge for death benefits which they are not eligible to receive. It appears that these complaints are well-founded.

First, United Academics included among its "chargeable expenses" a $662 entry listed as a "membership drive." *See* Docket No. 24, Exh. A at 23. The Supreme Court has emphasized that a balance must be struck between dissenters' constitutional rights not to be compelled to speak or associate with causes the dissenters do not support and a union's ability to collect the costs attributable to its collective bargaining activities. "[T]he objective must be to devise a way of preventing compulsory subsidization of ideological activities by employees who object thereto without restricting the Union's ability to require

More important than parsing a dictum set forth in a case's footnote, First Amendment concerns suggest that United Academics' argument should fail. As noted above, the balance to be struck in determining the chargeability of costs is between allowing a union to recover costs associated with collective bargaining without forcing the agency fee payer to speak in ways in which he or she does not wish. The only additional benefit that agency fee payers gain by joining the Union is to gain the Union's political voice, and the agency fee payer has already indicated that he or she does not wish to be represented by that voice. The agency fee payer gains nothing in the collective bargaining realm, but is forced to speak in a way in which he or she has already expressly rejected. By forcing agency fee payers to support efforts to recruit them would force them to pay for a share of a message they do not wish to hear. Costs associated with recruiting agency fee payers are non-chargeable to the agency fee payers.

United Academics also treats as chargeable to agency fee payers a $1.00 per month, per member fee to the American Federation of Teachers for disability death benefits. *See* Docket No. 42, Exh. D(6) at 2 ("United Academics also pays a one dollar per month insurance premium on members. Those premiums are 100% chargeable."). United Academics argues that the benefit is available to the agency fee payers and therefore chargeable. Notwithstanding United Academics' construction of the term in its moving papers, it appears that the documents submitted by United Academics supports the conclusion that the fee is not chargeable. While agreeing with Plaintiffs that they could not charge such a fee if the benefit was not available to Plaintiffs, United Academics argues that the term "members" as used in the description of those eligible for the benefit includes agency fee payers as well as Union members. According to an

to the language that immediately-precedes the sentence, which discussed agency shops.

More important than parsing a dictum set forth in a case's footnote, First Amendment concerns suggest that United Academics' argument should fail. As noted above, the balance to be struck in determining the chargeability of costs is between allowing a union to recover costs associated with collective bargaining without forcing the agency fee payer to speak in ways in which he or she does not wish. The only additional benefit that agency fee payers gain by joining the Union is to gain the Union's political voice, and the agency fee payer has already indicated that he or she does not wish to be represented by that voice. The agency fee payer gains nothing in the collective bargaining realm, but is forced to speak in a way in which he or she has already expressly rejected. By forcing agency fee payers to support efforts to recruit them would force them to pay for a share of a message they do not wish to hear. Costs associated with recruiting agency fee payers are non-chargeable to the agency fee payers.

United Academics also treats as chargeable to agency fee payers a $1.00 per month, per member fee to the American Federation of Teachers for disability death benefits. *See* Docket No. 42, Exh. D(6) at 2 ("United Academics also pays a one dollar per month insurance premium on members. Those premiums are 100% chargeable."). United Academics argues that the benefit is available to the agency fee payers and therefore chargeable. Notwithstanding United Academics' construction of the term in its moving papers, it appears that the documents submitted by United Academics supports the conclusion that the fee is not chargeable. While agreeing with Plaintiffs that they could not charge such a fee if the benefit was not available to Plaintiffs, United Academics argues that the term "members" as

the availability of the benefit to agency fee payers in future mailings.

G. Did United Academics misstate Alaska law?

Plaintiffs argue that United Academics' notice mislead its recipients by suggesting that automatic dues deductions are possible without the employees' authorization. In its October mailing, United Academics included the following paragraph:

> Alaska law permits collective bargaining between Public employees and the United Academics, AAUP/AFT that authorizes the employers to deduct a dues amount (fee) from the salary or wages of all United Academics, AAUP/AFT members of the bargaining unit for which United Academics, AAUP/AFT is the exclusive representative. The dues are remitted to United Academics, AAUP/AFT on a monthly basis and are to be used to support the United Academics, AAUP/AFT's work on behalf of its members with regard to their employment relations with their employer. Members who choose not to be members of the United Academics, AAUP/AFT must still pay what is called an "Agency Fee" amount.

See Docket No. 42, Exh. D(3) at 1. Plaintiffs argue that the first sentence can be construed as indicating that United Academics can deduct the fee amount from the employee's salary without their approval, which, they argue, is a misstatement of Alaska law. They argue that the notice is therefore constitutionally infirm. The Court disagrees.

If the first sentence of the notice could arguably imply that agency fee deductions will be automatic, when read as a whole, the notice makes clear that employees must authorize fee deductions. In the section of the notice titled "Payment of the

not chargeable to agency fee payers. Defendants should clarify the availability of the benefit to agency fee payers in future mailings.

G. Did United Academics misstate Alaska law?

Plaintiffs argue that United Academics' notice mislead its recipients by suggesting that automatic dues deductions are possible without the employees' authorization. In its October mailing, United Academics included the following paragraph:

> Alaska law permits collective bargaining between Public employees and the United Academics, AAUP/AFT that authorizes the employers to deduct a dues amount (fee) from the salary or wages of all United Academics, AAUP/AFT members of the bargaining unit for which United Academics, AAUP/AFT is the exclusive representative. The dues are remitted to United Academics, AAUP/AFT on a monthly basis and are to be used to support the United Academics, AAUP/AFT's work on behalf of its members with regard to their employment relations with their employer. Members who choose not to be members of the United Academics, AAUP/AFT must still pay what is called an "Agency Fee" amount.

See Docket No. 42, Exh. D(3) at 1. Plaintiffs argue that the first sentence can be construed as indicating that United Academics can deduct the fee amount from the employee's salary without their approval, which, they argue, is a misstatement of Alaska law. They argue that the notice is therefore constitutionally infirm. The Court disagrees.

If the first sentence of the notice could arguably imply that agency fee deductions will be automatic, when read as a whole, the notice makes clear that employees must authorize fee

claim for indemnification damages, but otherwise oppose the Union's motion. Because the parties agree that the claim for indemnification damages should be dismissed, albeit on different grounds, that claim is not addressed here and will be deemed abandoned.

A. Should the Court dismiss Plaintiffs' claim for punitive damages?

Plaintiffs seek punitive damages "for the wanton and outrageous conduct of demanding and/or requiring payment of agency fees in the absence of any of the required procedural safeguards." *See* Docket No. 40 at 18 (amended complaint). Punitive damages are available under 28 U.S.C. § 1983, *see, e.g., Smith v. Wade*, 461 U.S. 30, 56 (1983), albeit under a very high standard. It appears that United Academics has demonstrated the absence of a genuine issue of material fact regarding the availability of punitive damages. The Union's motion for summary judgment with respect to punitive damages will be granted.

Section 1983 "was intended to create a species of tort liability in favor of persons deprived of federally secured rights." *See Smith v. Wade*, 461 U.S. at 34 (internal quotation marks and citation omitted). As such, the Supreme Court has recognized that punitive damages are available to plaintiffs alleging deprivations of constitutional rights in "proper" § 1983 cases. *See id.* at 35 (quoting *Carlson v. Green*, 446 U.S. 14, 22 (1980)). According to the Court, "a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *See id.* at 56. The Ninth Circuit has also held that "even if this standard were met, the jury must also determine

indemnification damages and injunctive relief. Plaintiffs agree to drop the claim for indemnification damages, but otherwise oppose the Union's motion. Because the parties agree that the claim for indemnification damages should be dismissed, albeit on different grounds, that claim is not addressed here and will be deemed abandoned.

A. Should the Court dismiss Plaintiffs' claim for punitive damages?

Plaintiffs seek punitive damages "for the wanton and outrageous conduct of demanding and/or requiring payment of agency fees in the absence of any of the required procedural safeguards." *See* Docket No. 40 at 18 (amended complaint). Punitive damages are available under 28 U.S.C. § 1983, *see, e.g., Smith v. Wade*, 461 U.S. 30, 56 (1983), albeit under a very high standard. It appears that United Academics has demonstrated the absence of a genuine issue of material fact regarding the availability of punitive damages. The Union's motion for summary judgment with respect to punitive damages will be granted.

Section 1983 "was intended to create a species of tort liability in favor of persons deprived of federally secured rights." *See Smith v. Wade*, 461 U.S. at 34 (internal quotation marks and citation omitted). As such, the Supreme Court has recognized that punitive damages are available to plaintiffs alleging deprivations of constitutional rights in "proper" § 1983 cases. *See id.* at 35 (quoting *Carlson v. Green*, 446 U.S. 14, 22 (1980)). According to the Court, "a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *See id.* at 56. The Ninth Circuit has

presents no evidence that supports the necessary standard, a grant of summary judgment is appropriate. *See id.* at 182-88. "Further, if defendant introduces evidence that the challenged conduct . . . was entered into in good faith and not recklessly and plaintiff fails to rebut that evidence, summary judgment will be granted." *Id.* Additionally, concerns about summary disposition of issues related to state of mind are not implicated where the Court bases its ruling on legal issues unrelated to the parties' intentions and motives.

Here, Plaintiffs allege that United Academics' initial demands, which this Court has found did not comply with *Hudson*, demonstrate actual malice or wanton indifference to Plaintiffs' rights.[5] Despite the fact that there might be an issue of fact regarding the Union's state of mind, punitive damages are not available here as a matter of law. In March and April of 1998, United Academics sent to the Plaintiffs letters demanding full union dues. In the first letter, United Academics advised Plaintiffs that "[a]s a condition of your employment and continuing employment, you are required to provide the University with a written authorization to deduct those fees from your paycheck. . . . The payment of the fees is not an option; it is mandatory so long as you work at the University of Alaska and are represented by United Academics." *See* Docket No. 40, Exh. B(1). The letter indicated that Plaintiffs would be required to pay full union dues and, upon a determination of what percentage of the union dues the agency fees comprised, the letter implied that the difference would be refunded to Plaintiffs. *See id.* Subsequently, United

---

[5] Plaintiffs also argue that United Academics' alleged misstatement of Alaska law, discussed above, demonstrates conduct for which punitive damages should be awarded. Because United Academics made no misstatement of Alaska law, the argument is not addressed here.

10B Charles Alan Wright, *et al., Federal Practice & Procedure* § 2732.4, 152-54 (3d ed. 1998). According to the same treatise, however, where a plaintiff alleging a constitutional deprivation presents no evidence that supports the necessary standard, a grant of summary judgment is appropriate. *See id.* at 182-88. "Further, if defendant introduces evidence that the challenged conduct . . . was entered into in good faith and not recklessly and plaintiff fails to rebut that evidence, summary judgment will be granted." *Id.* Additionally, concerns about summary disposition of issues related to state of mind are not implicated where the Court bases its ruling on legal issues unrelated to the parties' intentions and motives.

Here, Plaintiffs allege that United Academics' initial demands, which this Court has found did not comply with *Hudson*, demonstrate actual malice or wanton indifference to Plaintiffs' rights.[5] Despite the fact that there might be an issue of fact regarding the Union's state of mind, punitive damages are not available here as a matter of law. In March and April of 1998, United Academics sent to the Plaintiffs letters demanding full union dues. In the first letter, United Academics advised Plaintiffs that "[a]s a condition of your employment and continuing employment, you are required to provide the University with a written authorization to deduct those fees from your paycheck. . . . The payment of the fees is not an option; it is mandatory so long as you work at the University of Alaska and are represented by United Academics." *See* Docket No. 40, Exh. B(1). The letter indicated that Plaintiffs would be required to

---

[5] Plaintiffs also argue that United Academics' alleged misstatement of Alaska law, discussed above, demonstrates conduct for which punitive damages should be awarded. Because United Academics made no misstatement of Alaska law, the argument is not addressed here.

representatives." *See* 475 U.S. at 301-02 (quoting *Abood*, 431 U.S. at 234) (internal quotation marks omitted) (emphasis added). Rather than expanding the right to include a right to notice, as Plaintiffs appear to interpret the case, *Hudson* suggests that the Court was merely concerned with implementing procedures to guarantee that agency fee payers' rights were protected. The *Hudson* Court articulated the issue before it as follows:

> The question presented in this case is whether the procedure used by the Chicago Teachers Union and approved by the Chicago Board of Education adequately protects the basic distinction drawn in *Abood*: "[t]he objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective bargaining activities."

See id. (quoting *Abood*, 431 U.S. at 237). Nowhere else does the *Hudson* Court suggest that the notice and other requirements discussed in the decision are constitutional rights separate from the right to not be compelled join the union in political or other ideological speech. *See generally id.* Additionally, although the Ninth Circuit appears to have considered inadequate notice sufficient to support a cause of action even where the agency fee payers have paid no fees, in *dicta* the court noted that the damages available to plaintiffs were nominal damages and attorney fees and not punitive damages. *See Knight v. Kenai Peninsula Borough Sch. Dist.*, 131 F.3d 807812 (9th Cir. 1997).

It is true that the Union sent Plaintiffs forcefully-worded letters containing explicit and implicit threats. However, Plaintiffs have not paid any fees to the Union, either as union dues or agency fees. Therefore, they have not been compelled to speak through the Union and have suffered no constitutional

at issue is "to prevent the Union's *spending* a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representatives." *See* 475 U.S. at 301-02 (quoting *Abood*, 431 U.S. at 234) (internal quotation marks omitted) (emphasis added). Rather than expanding the right to include a right to notice, as Plaintiffs appear to interpret the case, *Hudson* suggests that the Court was merely concerned with implementing procedures to guarantee that agency fee payers' rights were protected. The *Hudson* Court articulated the issue before it as follows:

> The question presented in this case is whether the procedure used by the Chicago Teachers Union and approved by the Chicago Board of Education adequately protects the basic distinction drawn in *Abood*: "[t]he objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective bargaining activities."

See id. (quoting *Abood*, 431 U.S. at 237). Nowhere else does the *Hudson* Court suggest that the notice and other requirements discussed in the decision are constitutional rights separate from the right to not be compelled join the union in political or other ideological speech. *See generally id.* Additionally, although the Ninth Circuit appears to have considered inadequate notice sufficient to support a cause of action even where the agency fee payers have paid no fees, in *dicta* the court noted that the damages available to plaintiffs were nominal damages and attorney fees and not punitive damages. *See Knight v. Kenai Peninsula Borough Sch. Dist.*, 131 F.3d 807812 (9th Cir. 1997).

It is true that the Union sent Plaintiffs forcefully-worded letters containing explicit and implicit threats. However,

agency fee from either Plaintiff until proper notice is given. Plaintiffs have not been threatened with termination by United Academics or the University, and public employers such as the University are forbidden from terminating any faculty member for nonpayment of agency fees until the demanding union confirms to the employer's satisfaction that it has complied with the requirements of *Hudson*. *See Knight*, 131 F.3d at 817. The granting of permanent injunctive relief in favor of Plaintiffs against United Academics would essentially be premised upon the prevention of conduct which United Academics is powerless to cause.

Moreover, an injunction is an equitable remedy that does not issue as a matter of course. Plaintiffs have made no showing that they have no adequate remedy at law and will suffer irreparable injury if denied injunctive relief. *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987) ("The basis for injunctive relief is irreparable injury and inadequacy of legal remedies."). Injunctive relief is only proper if monetary damages or other legal remedies will not compensate the plaintiffs for their injuries. *See LaDuke v. Nelson*, 762 F.2d 1318, 1330 (9th Cir. 1985). Plaintiffs are represented by a national foundation devoted to employment and labor law issues, and as demonstrated by the request for relief set forth in this action, agency fees collected in noncompliance with *Hudson* are routinely returned to nonunion employees.

See Docket No. 37 at 10-11. Plaintiffs have made no argument that the Court was incorrect in its reasoning, which remains sound.

In addition, in order to draft a meaningful injunction the Court would need to identify specific wrongful conduct likely to occur in the future in the absence of an injunction. It appears the

It does not appear, however, that this would be an appropriate action for the Court to grant permanent injunctive relief against agency fee demands of and collections from Plaintiffs. It is clear that United Academics cannot collect an agency fee from either Plaintiff until proper notice is given. Plaintiffs have not been threatened with termination by United Academics or the University, and public employers such as the University are forbidden from terminating any faculty member for nonpayment of agency fees until the demanding union confirms to the employer's satisfaction that it has complied with the requirements of *Hudson*. *See Knight*, 131 F.3d at 817. The granting of permanent injunctive relief in favor of Plaintiffs against United Academics would essentially be premised upon the prevention of conduct which United Academics is powerless to cause.

Moreover, an injunction is an equitable remedy that does not issue as a matter of course. Plaintiffs have made no showing that they have no adequate remedy at law and will suffer irreparable injury if denied injunctive relief. *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987) ("The basis for injunctive relief is irreparable injury and inadequacy of legal remedies."). Injunctive relief is only proper if monetary damages or other legal remedies will not compensate the plaintiffs for their injuries. *See LaDuke v. Nelson*, 762 F.2d 1318, 1330 (9th Cir. 1985). Plaintiffs are represented by a national foundation devoted to employment and labor law issues, and as demonstrated by the request for relief set forth in this action, agency fees collected in noncompliance with *Hudson* are routinely returned to nonunion employees.

APPENDIX E

FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

30 March 2000

[Clerk's stamps omitted in printing]

William K. Jermain, Esq.
JERMAIN, DUNNAGAN & OWENS, P.C.
3000 A Street, Ste. 300
Anchorage, AK 99503
(907) 563-8844

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ROBERT F. CARLSON and
JOHN MORACK,

Plaintiffs,

v. **Case No. A98-0141 CIV (JKS)**

UNITED ACADEMICS-AAUP/AFT/
APEA, AFL-CIO,

Defendant.

FINAL JUDGMENT [~~PROPOSED~~]

This matter having been brought before the court on the motions of plaintiffs, Robert F.Carlson and John Morack, for entry of summary judgment, and the cross-motion for summary judgment of defendant, United Academics-AAUP/AFT, APEA, AFL-CIO, and the court having considered the arguments of

counsel, and having entered its orders dated February 16, 1999, and February 10, 2000, and being fully advised,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. That United Academics' demands for agency fee in March and April 1998 violated the procedural safeguards of ***Chicago Teachers Union Local No. 1 v. Hudson***, 475 U.S. 292 (1986) by demanding the payment of agency fees prior to (a) providing adequate financial information regarding the expen-ditures of its affiliates, and (b) failing to provide any opportunity for challenging the fee calculation before an impartial arbitrator.

2. That a declaratory judgment is issued finding that United Academics' initial demands for the payment of agency fee by failing to provide these necessary safeguards violates the First, Fifth, and Fourteenth Amendments of the Constitution of the United States and is a violation of 42 U.S.C. Sec. 1983.

3. That as a result of these violations, plaintiffs, Robert F. Carlson and John Morack, are entitled to nominal damages in the amount of $1.00 each as a result of this unlawful demand for the payment of agency fees.

4. That plaintiffs' demand for an injunction against United Academics is denied since defendant has made no demand for the termination of faculty based upon this unlawful notice and the employer, not the union, can effectuate a discharge. There is no showing of the necessary element of irreparable injury by plaintiffs.

5. That the subsequent notices provided by United Academics in October and December 1998 provided:

(a) adequate notice to agency fee payers by setting forth as separate line items the expenses attributable to AAUP, CBC, and AAUP.

(b) contained no discrepancy between United Academics and AAUP's treatment of the AAUP CBC payment.

(c) did not discriminate between the challengers and objectors to United Academics' agency fee. That objectors who agree to the United Academics' calculation of agency fee may waive their right to protest the calculation of the fee while those who chose to challenge the calculation of the fee through an impartial arbitrator are only required by the union to pay the union's estimate of the agency fee payers' pro-rata share of expenses and is in accord with the procedures in ***Grunwald v. San Bernardino City Unified School District***, 994 F.2d 1370 (9th Cir. 1995).

6. The ability of the impartial arbitrator to increase the agency fees is not unconstitutional since the arbitrator could only increase fees if there was a mathematical error in the calculation.

7. That all future agency fee notices provided by United Academics shall provide audited affiliate information and the right to challenge the amount of the fee before an impartial arbitrator with the amount of the fee in dispute being held in escrow.

8. That the expense of $662.00 chargeable for the Union to convince nonmembers to join the union is an improper chargeable expense and that the $1.00 per month per member fee for death benefits is also improper since it does not appear that protestors are entitled to the benefit.

9. That the notice properly states Alaska law by allowing the election of payroll deduction or by direct payment by an agency fee payer.

10. That the December 1998 mailing by United Academics provided adequate information to agency fee payers regarding the arbitration process.

11. The plaintiffs, Robert F. Carlson and John Morack, are not entitled to punitive damages as a matter of law since plaintiffs paid no money to the union, and, therefore, they were not coerced to pay for ideological beliefs that they did not support.

Date: 3/29/2000. By: /s/
James K. Singleton
USDC Judge

CERTIFICATE OF SERVICE
I HEREBY CERTIFY that the foregoing was mailed this 24th day of March, 2000, to the following:

Jeffrey S. Moeller
STOCK & MOELLER, LLC
645 G St., Ste. 201
Anchorage, AK 99501-3451

W. James Young, Esq.
c/o National Right to Work Legal
Defense Foundation
8001 Braddock Road, Ste. 600
Springfield, VA 22160-2110

JERMAIN, DUNNAGAN & OWENS, P.C.

/s/
Julie A. Verrett
Certified Professional Legal Secretary

APPENDIX F

ORDER ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

22 October 2001

[Clerk's stamp omitted in printing]
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT F. CARLSON; JOHN MORACK, Plaintiffs-Appellants, v. UNITED ACADEMICS-AAUP/AFT/APEA, AFL-CIO, Defendant-Appellee.	No. 00-35399 D.C. No. CV-98-00141-A-JKS ORDER

Before: HUG and T.G. NELSON, Circuit Judges, D. PREGERSON, District Judge.*

Judges Hug and T.G. Nelson have voted to deny appellants' petition for rehearing and petition for rehearing en banc. Judge D. Pregerson has voted to deny the petition for rehearing and recommended denying the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing and petition for rehearing en banc are denied.

---

* Honorable Dean D. Pregerson, United States District Judge for the Central District of California, sitting by designation.

APPENDIX G

UNITED STATES CONSTITUTION
First Amendment

UNITED STATES CONSTITUTION
First Amendment

The First Amendment provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX H

UNITED STATES CONSTITUTION
Fourteenth Amendment

UNITED STATES CONSTITUTION
Fourteenth Amendment

The Fourteenth Amendment provides in pertinent part:

> **Section 1.** . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX I

CIVIL RIGHTS ACT OF 1871
42 U.S.C. § 1983 (West Supp. 2000)

CIVIL RIGHTS ACT OF 1871
42 U.S.C. § 1983 (West Supp. 2000)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

APPENDIX J

ALASKA STATUTES
Section 23.40.250

ALASKA STATUTES
Sec. 23.40.250 Definitions.

In AS 23.40.070 -- 23.40.260, unless the context otherwise requires,

* * *

(6) "public employee" means any employee of a public employer, whether or not in the classified service of the public employer, except elected or appointed officials or superintendents of schools;

(7) "public employer" means the state or a political subdivision of the state, including without limitation, a municipality, district, school district, regional educational attendance area, board of regents, public and quasi-public corporation, housing authority, or other authority established by law, and a person designated by the public employer to act in its interest in dealing with public employees; . . . .

APPENDIX K

ALASKA STATUTES
Section 23.40.080

ALASKA STATUTES

Sec. 23.40.080 Rights of public employees.

Public employees may self-organize and form, join, or assist an organization to bargain collectively through representatives of their own choosing, and engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

APPENDIX L

ALASKA STATUTES
Section 23.40.110

ALASKA STATUTES
Sec. 23.40.110 Unfair labor practices.

(b) Nothing in this chapter prohibits a public employer from making an agreement with an organization to require as a condition of employment

(1) membership in the organization which represents the unit on or after the 30th day following the beginning of employment or on the effective date of the agreement, whichever is later; or

(2) payment by the employee to the exclusive bargaining agent of a service fee to reimburse the exclusive bargaining agent for the expense of representing the members of the bargaining unit.

(2)

Supreme Court U.S.
FILED
FEB 27 2002

No. 01-1090

In The

Supreme Court of the United States

ROBERT F. CARLSON AND JOHN MORACK,

Petitioners,

v.

UNITED ACADEMICS – AAUP/AFT, AFL-CIO,

Respondent.

On Petition For Writ Of *Certiorari*
To The United States Court Of Appeals
For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM K. JERMAIN
Counsel of Record
JERMAIN DUNNAGAN & OWENS
3000 A Street, Suite 300
Anchorage, Alaska 99503
(907) 563-8844

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

248

TABLE OF CONTENTS

Page

STATEMENT OF THE FACTS 1

REASONS FOR DENYING THE WRIT 3

I. THE DENIAL OF CLASS CERTIFICATION SHOULD BE AFFIRMED 4

A. The denial of class certification was not an abuse of discretion 4

B. Petitioners failed to meet the criteria for class certification 5

C. The Petitioners' claims were not typical of the class they sought to represent 6

D. Petitioners could not fairly and adequately represent the interest of the putative class 7

E. Corrections to the *Hudson* Notice Effectively Apply to All Faculty 11

II. THE ISSUE OF UNITED ACADEMICS' NOTICE, AFTER IT CORRECTED ANY DEFICIENCIES, WAS CORRECTLY TREATED AS MOOT 12

A. The violation has ceased and subsequent events have "completely and irrevocably eradicated the effects of the alleged violation" 13

III. THE DECEMBER NOTICE PROVIDED BY THE UNION DOES *NOT VIOLATE THE REQUIREMENTS OF HUDSON* 16

A. United Academics did not discriminate between challengers and objectors 16

B. The threat of imposing an increased fee is not unconstitutional 17

CONCLUSION 19

TABLE OF AUTHORITIES

Page

Adarand Constructors, Inc. v. Slater, 528 U.S. 216 (2000) 12

Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997) 5

Barber v. Hawaii, 42 F.3d 1185 (9th Cir. 1994) 5

Brotherhood of Ry. and S.S. Clerks v. Allen, 373 U.S. 113 (1963) 8

Chicago Teachers Union, Local No. 1. v. Hudson, 475 U.S. 292 (1986) 2

County of Los Angeles v. Davis, 440 U.S. 625 (1979) 13

Davis v. Comed, 619 F.2d 588 (6th Cir. 1980) 11

East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395 (1977) 8

Ford v. United Bhd. of Carpenters, 323 F. Supp. 1136 (D. Pa. 1970) 8

Friends of the Earth, Inc. v. Laidlaw Environmental Serv., Inc., 528 U.S. 167 (2000) 13

Gilpin v. American Federation of State, County and Mun. Employees, 875 F.2d 1310 (7th Cir. 1989), *cert. denied*, 493 U.S. 917 (1989) 10, 12

Grunwald v. San Bernardino City Unified School Dist., 994 F.2d 1370 (9th Cir. 1993).....17, 18

Kidwell v. Transportation Communications Int'l Union, 946 F.2d 283 (4th Cir. 1991)..... 7

Knight v. Kenai Peninsula Borough School Dist., 131 F.3d 807 (9th Cir. 1997).....2, 18

TABLE OF AUTHORITIES – Continued

Page

Leer v. Washington Education Ass'n, 172 F.R.D. 439 (D.Wash. 1997) 10

Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1981) 9

Mayfield v. Dalton, 109 F.3d 1423 (9th Cir. 1997) 5

Mitchell v. Los Angeles Unified School Dist., 963 F.2d 258 (9th Cir. 1992) 8, 9

Nelsen v. King County, 895 F.2d 1248 (9th Cir. 1990) 5

New Left Educ. Project v. Board of Regents, 414 U.S. 807 (1973) 14

Philips v. Klassen, 502 F.2d 362 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 996 (1974) 11

Pilots Against Illegal Dues v. Air Line Pilots Ass'n, 938 F.2d 1123 (10th Cir. 1991) 8

Railway Clerks v. Allen, 373 U.S. 113 (1963) 17

Reich v. Occupational Safety, 102 F.3d 1200 (11th Cir. 1997) 13

SEC v. Medical Committee for Human Rights, 404 U.S. 403 (1972) 13

Siles v. ILGWU National Retirement Fund, 783 F.2d 923 (9th Cir. 1986) 4

Six Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301 (9th Cir. 1990) 5

Steffel v. Thompson, 415 U.S. 452 (1974) 13

United Independent Flight Officers v. United Airlines, 756 F.2d 1274 (7th Cir. 1985) 11

TABLE OF AUTHORITIES – Continued

Page

United States v. W.T. Grant Co., 345 U.S. 629 (1953) 12

Weaver v. University of Cincinnati, 970 F.2d 1523 (6th Cir. 1992) 7, 12

STATUTES AND RULES:

A.S. 23.40.110 1

Sup. Ct. R. 10 4

F.R.Civ.P. 23(a) 5, 6

F.R.Civ.P. 23(b) 5

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE FACTS

Respondent, United Academics ("Union"), is the certified exclusive bargaining representative for faculty employed by the University of Alaska ("University"). Respondent was certified in 1996 by the Alaska Labor Relations Agency under the State's Public Employment Relations Act ("PERA"). Pet. App. J at 83a and App. K at 84a. Petitioners, Carlson and Morack, are employees of the University of Alaska at Fairbanks. Pet. App. A at 2a.

As required by A.S. 23.40.110, and as set forth in the collective bargaining agreement between the University and United Academics, Petitioners are part of a bargaining unit comprised of all regular, non-adjunct, teaching and research professors at the University. Alaska's PERA authorizes payment of an agency fee as a condition of employment. Pet. App. L at 85a. Pursuant to that statutory provision, United Academics and the University negotiated language in the collective bargaining agreement that permits the deduction of dues or agency fees from employee wages. The collective bargaining agreement requires all research and teaching faculty in the bargaining unit to either maintain membership in United Academics or, for those faculty members who have chosen to refrain from membership in the Union, to pay mandatory "agency fees" as a condition of continued employment. Pet. App. A at 2a. United Academics' Treasurer sent a memorandum in late March 1998 to all faculty informing them of this contractual obligation. In April 1998, a follow-up letter was sent to those professors

who had failed to respond. *Id.* at 2a-3a. Petitioners then filed this lawsuit. *Id.* at 3a.

During the suit, United Academics sent further notices to the faculty regarding payment of these agency fees. On October 12, 1998, United Academics distributed a new notice and demand which provided that, "[a]gency fees pursuant to the requirements of the United States Supreme Court decision, *Hudson v. Chicago Teachers Union*[1] will be initiated on November 15, 1998. Any agency fees collected prior to November 15, 1998 will be reimbursed to individual faculty members." Pet. App. C at 30a.

In a Motion for Summary Judgment, Carlson and Morack outlined what they alleged were constitutional deficiencies in the notice and procedures. *Id.* at 28a-29a. Later, United Academics sent a second post-filing letter dated December 1, 1998, and enclosed documents that were "inadvertently omitted from the material accompanying" the earlier *Hudson* notice. Pet. App. D at 43a.

In addition to making certain that it was complying with the notice requirements under *Hudson*, United Academics placed all agency fees received from non-member

---

[1] The United States Supreme Court in *Chicago Teachers Union, Local No. 1. v. Hudson*, 475 U.S. 292, 310 (1986) sets out specific minimum procedural obligations for unions to follow when seeking agency fees from members: "[1] an adequate explanation of the basis for the fee; [2] a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision-maker[;] and [3] an escrow for the amounts reasonably in dispute while such challenges are pending." *Knight v. Kenai Peninsula Borough School Dist.*, 131 F.3d 807, 810 (9th Cir. 1997).

bargaining unit employees into an escrow account. Pet. App. A at 12a. Furthermore, United Academics informed the University that no further agency fee deduction collected by the University were to be distributed to United Academics until the *Hudson* requirements were fulfilled. Pet. App. C at 37a. United Academics also retained a Seattle accounting firm to conduct an audit of its records for fiscal year 1997 (11/1/96-10/31/97) to determine properly apportioned chargeable and non-chargeable expenses. Pet. App. D at 48a-50a. United Academics further contacted the American Arbitration Association about using its services to provide impartial arbitrators to promptly hear and resolve any chargeable fee disputes. Pet. App. A at 5a, 8a-9a.

REASONS FOR DENYING THE WRIT

The three questions presented by the Petitioners are, first, whether class certification should be denied; second, whether the challenges to the United Academics' October notice should be treated as moot; and, third, whether the notice provided by the Union violated *Hudson* because the notice distinguishes between objectors and challengers and allows the Union to seek an increased fee from non-members challenging its calculation. The Ninth Circuit's conclusion that United Academics' subsequent notices complied with the requirements of *Hudson* was proper. The Ninth Circuit appropriately concluded that although the burden of demonstrating mootness is heavy, the Union fully met its burden on the record. Finally, the Ninth Circuit correctly found that class certification would serve no purpose.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10. "A petition for a writ of certiorari will be granted only for compelling reasons." *Id.* Petitioners have not presented any compelling reason for this Court to exercise its discretionary jurisdiction over this appeal. In an effort to grab this Court's attention, Petitioners argue that this is a case involving important questions of constitutional violations. This is, however, a routine mootness question and not a matter worthy of the Court's valuable time. Petitioners fail to identify any circuit split on an important federal issue, or any other reason to justify this Court's review of the disposition of their claim.

The Ninth Circuit's ruling was proper in all respects and Respondents respectfully urge this Honorable Court to deny the Petition for Writ of Certiorari.

I. THE DENIAL OF CLASS CERTIFICATION SHOULD BE AFFIRMED.

The Petitioners assert that class certification would serve a purpose by awarding absent class members declaratory and injunctive relief, as well as nominal damages. The Petitioners' position is illusory. No class was ever certified. Thus, there are no absent class members.

A. The denial of class certification was not an abuse of discretion.

A district court's denial of class certification will not be overturned unless the district court abused its discretion. *Siles v. ILGWU National Retirement Fund*, 783 F.2d

923, 926 (9th Cir. 1986); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997); *Barber v. Hawaii*, 42 F.3d 1185, 1197 (9th Cir. 1994); *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1304 (9th Cir. 1990); *Nelsen v. King County*, 895 F.2d 1248, 1249 (9th Cir. 1990). "A court abuses its discretion if it applies impermissible legal criteria." *Barber*, 42 F.3d at 1197. The Petitioners have presented no evidence to support the position that the district court abused its discretion in denying class certification. Instead, the Petitioners try to bootstrap class certification to their mootness argument. The Petitioners assert that as far as they can tell, no court has ever declared absent class members' claims for relief moot. The Petitioners repeatedly refer to these absent class members. However, the district court found that the plaintiff had failed to meet the requirement of F.R.Civ.P. 23a. Petitioners have failed entirely to meet their burden by demonstrating how the court's denial was an abuse of discretion.

B. Petitioners failed to meet the criteria for class certification.

The criteria that must be met for class certification is recited within F.R.Civ.P. 23. As the party seeking class certification, the Petitioners bore the burden of demonstrating that each of the requirements of Civil Rule 23(a), and at least one of the requirements of Civil Rule 23(b) were met. *Mayfield v. Dalton*, 109 F.3d 1423, 1427 (9th Cir. 1997). The district court found that Petitioners satisfied the numerosity and commonality requirements which comprise two of the four-part test. However, the district

court ruled class certification was inappropriate because the Petitioners failed to meet the remaining two parts of the test under Rule 23(a). The court found that the claims of the Petitioners were potentially in conflict with those of the proposed class and that the Petitioners could not adequately represent the class based on these conflicts.

The Petitioners could have gathered further information and conducted additional discovery or moved for class certification again. In the district court's order denying class certification, the court addressed the current status of the case and found that no justification for recognizing a class action existed *at this time*. *Id.* at 27a (emphasis added). The Petitioners were not foreclosed from submitting additional evidence to the court and seeking to certify the class at a later date, but Petitioners chose not to do so.

C. The Petitioners' claims were not typical of the class they sought to represent.

United Academics distributed two memoranda. The first informed all unit faculty who were not members of United Academics of the requirement that each pay an agency fee to offset the legitimate expenses of the labor organization in matters of collective bargaining, contract administration, and grievance representation. Pet. App. C at 30a. The second memorandum informed the Petitioners that if they failed to arrange for the automatic deduction of an agency fee by a set date, not only would they have to pay retroactive agency fees, but they would face the prospect of involuntary termination, or a collection action. *Id.*

After receiving the memoranda, some faculty authorized the deduction of an agency fee from their salaries. The Petitioners, however, did not respond at all. Pet. App. B at 19a. The Petitioners paid no dues to United Academics, nor did they authorize the deduction of agency fees from their wages consistent with the collective bargaining agreement. Pet. App. C at 36a n.3. Except for a small group of faculty, Carlson and Morack differ significantly from all other persons who were sent the notice. Thus, the district court correctly found that Carlson and Morack were not typical of the class they proposed to represent.

D. Petitioners could not fairly and adequately represent the interest of the putative class.

Carlson and Morack sought to represent agency fee payers who, while abstaining from Union membership, had no quarrel at all with United Academics and its affiliates and had never challenged the Union's calculations of chargeability. The class representative must "possess the same interest and suffer the same injury" as the class members.[2] Courts have proceeded cautiously when

---

[2] Courts have upheld the denial of certification of a class based upon similar allegations. *See Weaver v. University of Cincinnati*, 970 F.2d 1523, 1530 (6th Cir. 1992) (court held that certification of a class was not appropriate in part because the plaintiffs sought punitive damages and restitution of all agency fees received by the union and thus, "their choice of remedy is arguably antagonistic to the wishes of other employees."); *see also Kidwell v. Transportation Communications Int'l Union*, 946 F.2d 283, 305-06 (4th Cir. 1991) (National Right to Work Foundation was not an adequate litigation representative for those

addressing requests for class certifications in cases involving labor unions. The reasoning behind such cautiousness arises from the fact that unions represent a diverse constituency whose interests may diverge or vary based on context and circumstance. *See, e.g., East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977) (overruling class certification in part because of membership vote indicating conflict with plaintiff's position); *Ford v. United Bhd. of Carpenters*, 323 F. Supp. 1136, 1140 (D. Pa. 1970) (class certification denied where membership was sharply divided). The Petitioners' proposed class was extremely broad and included many employees whose interests were very diverse. The Petitioners failed to nominate a reasonably defined class.

In *Mitchell v. Los Angeles Unified School Dist.*, 963 F.2d 258 (9th Cir. 1992), the Ninth Circuit interpreted *Brotherhood of Ry. and S.S. Clerks v. Allen*, 373 U.S. 113, 119 (1963), in which this Court stated:

> [n]o respondent who does not in the course of further proceedings in this case prove that he objects to such use [of agency fees by the union for non-representation purposes] will be entitled to relief. This is not and cannot be a class action.

The Ninth Circuit, in *Mitchell*, interpreted and applied this principle as follows:

"nonunion employees who, while not wanting their fair share (and perhaps even wanting to pay less) than their 'fair share' fees, have no desire to ruin the union and impair its ability to represent them effectively. . . ."); *Pilots Against Illegal Dues v. Air Line Pilots Ass'n*, 938 F.2d 1123, 1133-34 (10th Cir. 1991) (conflict existed where "one of the plaintiffs sent out a misleading letter to potential class members.").

> The meaning of this statement is clear . . . employees who fail to object individually in the amount of the compulsory union dues have no right to receive relief from the payment of those dues. *Accord Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1004 (9th Cir. 1970) [on remand in action against union under the RLA, district court should include as plaintiffs only those employees who raised objection to the use of agency fees for political purposes].

963 F.2d at 260.

The Petitioners unreasonably persist in their argument that nonmembers who have never objected to payroll deductions, or to the principle that they should pay a fair share fee to support the Union's representation costs, or to calculations of chargeability made by the United Academics and its affiliates, should be part of the class that Carlson and Morack sought to have certified. The Petitioners' position is contrary to the failure to object principle set forth in *Mitchell v. Los Angeles Unified School District, supra*, as well as in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 520 (1981) (objecting employees not charged for activities that were unrelated to their collective bargaining agreement).

The district court, in its order denying Carlson and Morack's motion for class certification, discussed the distinctions between "free riders" and those individuals who are "hostile to the union." Pet. App. B at 26a. The court noted that, "Plaintiffs in this action seek injunctive relief, declaratory relief, equitable restitution, nominal

damages and punitive damages," and concluded that "Plaintiffs' demand for equitable restitution and punitive damages gives rise to precisely the sort of conflict of interest anticipated in *Gilpin* and assiduously avoided in *Leer*."[3] *Id.*

---

[3] In *Gilpin v. American Federation of State, County and Mun. Employees*, 875 F.2d 1310 (7th Cir. 1989), *cert. denied*, 493 U.S. 917 (1989), Judge Posner discussed the conflict:

> A potentially serious conflict of interest within the class precluded the named plaintiffs from representing the entire class adequately. Two distinct types of employees will decline to join the union representing their bargaining unit. The first is the employee who is hostile to unions on political or ideological grounds. The second is the employee who is happy to be represented by a union but won't pay any more for that representation than he is forced to. The two types have potentially divergent aims. The first wants to weaken, and if possible destroy the unions; the second, a free rider, wants merely to shift as much of the cost of representation as possible to other workers, i.e., union members.

Id. at 1313. Citing the National Right to Work Foundation's efforts to obtain the complete and total restitution of all agency fees paid by nonmembers to the union as part of its remedy, the district court observed that this request for relief created a significant disparity in the goals of the named petitioners and those of the putative class, and denied class certification. In *Leer v. Washington Education Ass'n*, 172 F.R.D. 439 (D.Wash. 1997), the court approved certification of a class of all agency fee payers upon its finding that the nonunion litigants sought only "injunctive and declaratory relief on their notice claim," and the total damages were limited to compensatory and nominal damages plus interest). *Id.* at 445-46. In *Leer*, the relief sought by the plaintiffs and their National Right to Work Legal Foundation counsel was narrow relief, and not, as here full "restitution".

The district court determined the remedy sought by the Petitioners was arguably antagonistic to the wishes of other employees.[4] The relief sought by the Petitioners of complete restitution of all fees collected (Pet. App. B at 17a), as well as "punitive damages" for the constitutional tort they claimed they suffered, are the types of remedies that create an obvious conflict between the interests of the Petitioners, such as Carlson and Morack, and other faculty members who do not share the same goals.

E. Corrections to the *Hudson* Notice Effectively Apply to All Faculty.

Any changes or corrections made by the Union to the *Hudson* notice apply not only to the Petitioners, but to all other faculty members. There is not a shred of evidence offered by the Petitioners that United Academics has deviated from its revised notice that fully complies with the standard set out in *Hudson*. Indeed, as the record in this case clearly shows, if the Union had done anything contrary or in violation of *Hudson*, the Petitioners would have pursued it. As discussed earlier, the Seventh Circuit

---

[4] *See Philips v. Klassen*, 502 F.2d 362, 365-68 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 996 (1974) (plaintiffs who challenged an early retirement program were not allowed to represent a class of employees "that [i]n all likelihood" included employees who were satisfied with the program); *United Independent Flight Officers v. United Airlines*, 756 F.2d 1274, 1284 (7th Cir. 1985) (denying class certification because some members opposed benefit changes for which plaintiffs sued; plaintiffs were members of organization antagonistic to union); *Davis v. Comed*, 619 F.2d 588, 595 (6th Cir. 1980) (lack of support by potential class members relevant to certification).

in *Gilpin* found that there was little or no legitimate need for a class action because "[t]he union's policy is to refund any overcharges determined by the arbitrator to all non-union members, whether or not they are parties to a judicial or arbitrable proceeding . . . " 875 F.2d at 1313. Similarly, the court in *Weaver* noted that certification of the class was not crucial because once the plaintiff had secured any relief, it would inure to the benefit of all the members of the proposed class anyway. *Weaver v. University of Cincinnati*, 970 F.2d 1523, 1531 (6th Cir. 1992). Like *Gilpin* and *Weaver*, the change in United Academics' *Hudson* notice has benefited all members.

The trial court enjoys considerable latitude in approving or denying class certification. The district court's decision finding that the Petitioners did not meet the typicality and adequacy of representation elements was not an abuse discretion.

II. THE ISSUE OF UNITED ACADEMICS' NOTICE, AFTER IT CORRECTED ANY DEFICIENCIES, WAS CORRECTLY TREATED AS MOOT.

In *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953), this Court held that the resignation of an individual from serving on the boards of several competing companies did not moot the case. Thus, the voluntary cessation of the board member's disputed service was not enough to moot the action. The Ninth Circuit has recognized that as a general rule "[v]oluntary cessation of challenged conduct moots a case . . . only if it is *'absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur.' " *Adarand Constructors, Inc. v. Slater,*

528 U.S. 216, 222 (2000) (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)); *see also Friends of the Earth, Inc. v. Laidlaw Environmental Serv., Inc.*, 528 U.S. 167 (2000).

In *County of Los Angeles v. Davis*, 440 U.S. 625 (1979), however, this Court articulated a two-pronged test for mootness. A case may become moot if (1) the alleged violation has ceased, and there is no reasonable expectation that it will recur, and (2) interim relief or events have "completely and irrevocably eradicated the effects of the alleged violation." *Id.* at 631; *see also Reich v. Occupational Safety*, 102 F.3d 1200 (11th Cir. 1997). The doctrine of mootness requires that an actual controversy must be in existence at all stages of review, not merely at the time the complaint was filed. *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974); *SEC v. Medical Committee for Human Rights*, 404 U.S. 403, 407 (1972).

A. The violation has ceased and subsequent events have "completely and irrevocably eradicated the effects of the alleged violation."

There is no reasonable expectation that United Academics would repeat the conduct challenged in this action. United Academics conceded that its notice was inadequate before its December mailing. United Academics admitted that its procedure was insufficient and incomplete and took prompt, affirmative steps to promptly change its practice. The Union corrected its notice and the lower courts found that the "December mailing cured any deficiency." Pet. App. E at 75a-78a. Moreover subsequent events – the mailing of later notices

and the correction of what the court found were errors – have eliminated the effects of the violation and complied with the obligations set forth in *Hudson*.

Despite this wealth of evidence in the record, the Petitioners argue that United Academics will remain "free to return to its old ways." Pet. at 12. However, as the district court provided, and the Ninth Circuit affirmed:

> It is clear that United Academics cannot collect an agency fee from either Plaintiff until after proper notice is given. Plaintiffs have not been threatened with termination by United Academics or the University, and public employers such as the University are forbidden from terminating any faculty member for nonpayment of agency fees until the demanding union confirms to the employer's satisfaction that it has complied with the requirements of *Hudson*.[5]

Pet. App. C at 37a. As the district court ruled, United Academics has clear incentive to continue to provide proper notice.

The Ninth Circuit sustained the district court ruling and found that it did "not believe United Academics would now attempt to revert to the deficient notice format and subject itself to future litigation that it would clearly lose." Pet. App. A at 15a. The Ninth Circuit found that "the conceded defect was cured, and therefore

---

[5] *See also New Left Educ. Project v. Board of Regents*, 414 U.S. 807 (1973) (remanding case to the district court with instructions to dismiss the case as moot when the defendant had complied with declaratory and injunctive relief ordered by the district court).

mooted, by the Union's actions . . . ." 265 F.3d at 787. The Ninth Circuit opined:

> [W]hen the district court considered and ruled on Appellant's renewed motion for summary judgment, the Union had conceded many months prior that the October notice was inadequate and had distributed the omitted material to all objectors in an attempt to comply with *Hudson*. Thus, the procedure as presented to the District court included both the admittedly deficient October demand and the amended December demand.
>
> It is unreasonable to think that the Union would resort to conduct that it had admitted in writing was constitutionally deficient and had attempted to correct over fourteen months prior to the district court's disposition of Appellants' challenge. In fact, the Union was attempting to comply with the *Hudson* standards several months before the district court filed its first order in which the court reviewed United Academics' initial demands and concluded they were constitutionally inadequate.

Id. at 786-87.

The challenged conduct has stopped and is highly unlikely to reoccur. In its final judgment, the district court denied the plaintiffs' request for a permanent injunction finding that "it appears that the parties are now in virtual agreement regarding the form of notices to be sent in the future to comply with *Hudson*." Pet. App. D. The district court found that the subsequent notices provided by United Academics cured any earlier defects by providing adequate notice. Pet. App. E at 75a-78a. United Academics meets the two-prong test for mootness.

III. THE DECEMBER NOTICE PROVIDED BY THE UNION DOES *NOT VIOLATE THE REQUIREMENTS OF HUDSON.*

A. United Academics did not discriminate between challengers and objectors.

The Petitioners argue that the December notice violates *Hudson* because the notice discriminates between objectors and challengers, and allows the Union to seek an increased fee from nonmembers challenging its calculation.

Relying on *Hudson* in its decision, the Ninth Circuit stated:

> "It is well-settled that a nonunion member can be forced to share in the expenses incurred by a union in its role as the exclusive bargaining representative on behalf of employees." *See Hudson*, 475 U.S. at 301. "However, a union cannot, without infringing upon First Amendment rights, force nonmembers to pay for expenses related to political and ideological activities unrelated to the union's duties as bargaining representative. *See id.* at 302."

Pet. App. A at 7a.

Contrary to the Petitioners' suggestion, there is nothing in the Notice that amounts to a demand by United Academics upon agency fee payers that they remit the same amount as full member dues. In fact, the agency fee payer, regardless of his/her objector status, would contribute no more than $626.40, a 13% reduction in full member dues. Pet. App. D at 50a.

Because of this distinction in the amount assessed between members and nonmembers, a Class I Objector would only pay the agency fee and would be entitled to any return of nonchargeable amounts determined at a later time. *Id.* at 50a-51a. By contrast, the Class II Objector would not only pay the agency fee, but would be entitled to a prompt resolution of his/her objection before an impartial arbitrator and placement of the entire amount of the agency fee paid in an escrow account pending the arbitrator's decision. *Id.* at 51a. Should the Class II objector prevail, s/he would be entitled to the monetary value of any correction by the arbitrator.

There is no constitutional deficiency here. The procedure distinguishing between Class I and Class II objectors gives faculty two options, and those who elect the second option have the entirety of their agency fee placed into escrow pending the conclusion of the arbitration procedure. *See Grunwald v. San Bernardino City Unified School Dist.*, 994 F.2d 1370, 1374 (9th Cir. 1993) (upholding full escrow pending determination of charges). The procedure adopted by United Academics is consistent with constitutional requirements.

B. The threat of imposing an increased fee is not unconstitutional.

"Absolute precision in the agency fee calculation is not required." *Hudson*, 475 U.S. at 306; *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963). It is possible that the amount of nonchargeable expenses may increase by virtue of an arbitrator's finding that the original determination was incorrect. The true inquiry is the actual costs of

the chargeable amounts claimed by the union to be part of the agency fee, and whether the mathematical determination is supported by documentation. *Knight*, 131 F.3d at 813. Thus, the only possible way an increase could occur is if the calculations were in error.

The Notice provides that anyone entering the system agrees that "the arbitrator may either approve the United Academics' . . . calculations and increase or decrease the amount . . . attributable to 'non-chargeable' activities." Pet. App. D at 56a. That portion of the Notice which states that agency fees might be increased for those who object and proceed to arbitration is not clearly unconstitutional.

Simple mathematical miscalculations that lead to an upward adjustment in chargeable expenses do not reflect an unconstitutional effort to penalize objectors who wish to have the fee determination scrutinized before either an independent arbitrator or a court. In *Grunwald v. San Bernardino City Unified School District*, 994 F.2d 1370 (9th Cir. 1993), *cert. denied*, 510 U.S. 964 (1993), the Ninth Circuit noted that disputed amounts placed in escrow and bearing interest to reflect loss of the use of the money, resulted in an actual savings of $ .80. Although the amount was too small to be of practical significance, the court determined that "what matters is that the procedure adopted gives the objecting employee the benefit of any imprecision in the calculation process." *Id.* at 1374 n.3. Thus, the court recognized that the audit process was not expected to be perfect, nor the amounts withheld to be exact. Arbitral scrutiny could result in an adjusted figure, upward or downward. The district court correctly found that the ability of the impartial arbitrator to

increase the fee was not unconstitutional if there was a mathematical error in the calculation.

After considering the relevant facts and the applicable law, the Ninth Circuit properly rejected the Petitioners' challenge to the two-class objection system. Further the Ninth Circuit correctly found that adjustments in the chargeability amount, if in error, do not violate *Hudson*. The panel ruled, purely and simply, that the conceded defect in the Union's *Hudson* notice was cured and therefore mooted by the Union's action. This case raises no significant issue of law that warrants this Court's review.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

WILLIAM K. JERMAIN
Counsel of Record
JERMAIN DUNNAGAN & OWENS
3000 A Street, Suite 300
Anchorage, Alaska 99503
(907) 563-8844

Attorneys for Respondent

(3)

No. 01-1090

Supreme Court, U.S.
FILED
MAR 11 2002

IN THE

Supreme Court of the United States

ROBERT F. CARLSON AND JOHN MORACK,

Petitioners,

v.

UNITED ACADEMICS – AAUP/AFT, AFL-CIO,

Respondent.

On Petition for Writ of *Certiorari* to the
United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

W. JAMES YOUNG*
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

ATTORNEY FOR PETITIONERS
**Counsel of Record*

11 March 2002

1598

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. The Court Should Grant *Certiorari* on the First Question Presented Because the Ninth Circuit's Decision Conflicts with All Existing Law on the Issue 1

II. The Court Should Grant *Certiorari* Because a Constitutional Tortfeasor's Post-Suit Promises Are Insufficient to Moot a Case 7

III. The Court Should Grant *Certiorari* Because Discriminatory Treatment Against Those Exercising Constitutional Rights Violates Both Circuit Law and This Court's Jurisprudence 9

CONCLUSION 10

TABLE OF AUTHORITIES

Cases *Page*

Abrams v. CWA,
59 F.3d 1373 (D.C. CIR. 1995) 3, 4

Adarand Constructors, Inc. v. Slater,
528 U.S. 216 (2000) 7

Brotherhood of Ry. & S.S. Clerks v. Allen,
373 U.S. 113 (1963) 4, 5

City of Mesquite v. Aladdin's Castle, Inc.,
455 U.S. 283 (1982) 7

County of Los Angeles v. Davis,
440 U.S. 625 (1979) 8

Friends of the Earth v. Laidlaw Envtl. Servs., Inc.,
528 U.S. 167 (2000) 7

Grunwald v. San Bernardino City Unified Sch. Dist.,
994 F.2d 1370 (9TH CIR. 1993) 9

Horton v. Goose Creek Ind. Sch. Dist.,
690 F.2d 470 (5TH CIR. 1982) 6

International Ass'n of Machinists v. Street,
367 U.S. 740 (1961) 4

TABLE OF AUTHORITIES — CONTINUED

Page

Lerwill v. Inflight Motion Pictures, Inc.,
582 F.2d 507 (9TH CIR. 1978) 6

Lewis v. Curtis,
671 F.2d 779 (3D CIR. 1982) 5

Lowary v. Lexington Local Bd. of Educ.,
903 F.2d 422 (6TH CIR. 1991) 3

Mitchell v. Los Angeles Unified Sch. Dist.,
963 F.3d 258 (9TH CIR. 1992) 3, 4, 5, 9

Mitchell v. Los Angeles Unified Sch. Dist.,
744 F. Supp. 938 (C.D. CAL. 1990) 4, 5

Powell v. McCormack,
395 U.S. 486 (1969) 8

Prescott v. County of El Dorado,
177 F.3d 1102 (9TH CIR. 1999), *vacated*,
528 U.S. 1111 (2000), *reinstated in part*,
204 F.3d 984 (9TH CIR. 2000) 8

Social Services Union Local 535 v. County of Santa Clara,
609 F.2d 944 (9TH CIR. 1979) 5

TABLE OF AUTHORITIES — CONTINUED

Page

Teachers Local No. 1 v. Hudson,
475 U.S. 292 (1986) ..... *passim*

United States v. Generix Drug Corp.,
461 U.S. 453 (1983) 8

United States v. W.T. Grant Co.,
345 U.S. 629 (1953) 8

White v. Local 942, LIUNA,
90 F.R.D. 368 (D. AK. 1981) 6

Rules

FED. R. CIV. P.
Rule 23 6
Rule 23(a)(3) 2
Rule 23(a)(4) 2

ARGUMENT

Respondent United Academics-AAUP/AFT, AFL-CIO's ("United Academics") Brief in Opposition ("Opp."), page 4, does not dispute that the Ninth Circuit's decision, Appendix ("App.") A at 1a-16a, creates conflicts among the Circuits on the important questions presented by Petitioners ("the professors"). Instead, United Academics sows confusion by ignoring the decision below and arguing the merits of the case, and by misrepresenting the case's adjudicated facts (*i.e.*, the contents of its notice and procedures).

I. The Court Should Grant *Certiorari* on the First Question Presented Because the Ninth Circuit's Decision Conflicts with All Existing Law on the Issue.

The Ninth Circuit affirmed the denial of class certification upon the District Court's "judgment for the Union [*sic*] on the merits," concluding that "class certification would serve no purpose." App. A at 16a. The Ninth Circuit erred in its premise and defied this Court's decisionmaking and that of other Circuits in its conclusion. Petition ("Pet.") at 11-16. Rather than addressing the decision below, United Academics ignores and justifies it on other grounds.

United Academics' argument, Opp. at 3 (the "question[] presented by the Petitioners [is]...whether class certification should be denied"), does not bear upon the important first question presented. *Compare* Pet. at i ("Would class certification 'serve no purpose' in a civil rights suit when a district court has awarded declaratory and injunctive relief, and nominal damages, to the named plaintiffs, but not to the members of the class plaintiffs seek to represent?"). While it explains the Ninth Circuit's standard of review, Opp. at 4-5, United Academics fails

to notice that the court did "not consider whether the district court abused its discretion in denying Appellants' motion for class certification." App. A at 16a (emphasis added). Whether the District Court "abused its discretion" in denying class certification is of no moment to the important first question presented in the Petition, *i.e.*, whether an appeals court may refuse to review a class certification denial by ignoring the favorable judgment entered for plaintiffs and erroneously assuming that judgment was entered for the defendant. Pet. at i, Question I.

Moreover, the accusation that "Petitioners try to bootstrap class certification to their mootness argument," Opp. at 5, obfuscates that the Ninth Circuit's decision below applies mootness reasoning while failing to label it as such. App. A at 16a; 265 F.3d at 787.[1]

United Academics' Opposition inserts into the decisions below holdings and principles never enunciated therein, divining significance in the differences between the responses of absent class members and the named professors to two initial and identical constitutionally inadequate demands. However, the District Court's class certification decision, App. B at 17a-27a, does not make reference to how each professor's response was

---

[1] United Academics complains of the professors' use of the phrase "absent class members," claiming that "There are no[ne]," because "[n]o class was ever certified." Opp. at 4. A putative class certainly exists (and hence, there are absent class members), because denial of class certification was premised solely upon determination that the named professors failed the typicality and adequacy of representation prongs of Rule 23(a)(3) and (4), FED. R. CIV. P., because of their pursuit of punitive damages. App. B at 22a-27a. The District Court thus recognized the existence of a class of "potential objectors," *Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 306 (1986), while denying that the named plaintiffs could represent it.

relevant to determination of the typicality of the claims raised by the named professors. United Academics cites only the District Court's summary judgment decision, App. C at 36a n.3, in an inapposite reference to why the claim for equitable restitution raised in the Complaint, Record ("R.") 1, was moot.

United Academics casts *Mitchell v. Los Angeles Unified School District*, 963 F.3d 258 (9TH CIR. 1992), Opp. at 8-11, in a manner further demonstrating divisions among the Circuits justifying review by this Court. According to United Academics, *Mitchell*'s "principle," Opp. at 9 (apparently that "employees who fail to object individually to the amount of the compulsory union dues have no right to receive relief from the payment of those dues," *id.*, *citing* 963 F.2d at 260) means that no class can be certified unless it consists only of objectors, even where (as here) the claim challenges a union's notice and procedures as not satisfying *Hudson*'s requirements.

This casting of *Mitchell* defies two other circuits' decisions. The Sixth Circuit in *Lowary v. Lexington Local Board of Education*, 903 F.2d 422, 428-30 (6TH CIR. 1991), held that a nonmember need not object under a constitutionally-inadequate *Hudson* notice and procedures in order to be entitled to relief when attacking the notice and procedures. *Mitchell*, as cast by United Academics, even more directly conflicts with *Abrams v. CWA*, 59 F.3d 1373, 1377-78 (D.C. CIR. 1995). There, the court reversed denial of class certification because whether an employee becomes an actual objector is irrelevant to right to relief as a "potential objector" in an action, like this, under *Hudson*. Three years after *Mitchell*, the District of Columbia Circuit belies United Academics' misrepresentation of it by unambiguously declaring that "no court has held that a class consisting of all agency shop employees may not be certified for the purpose" of challenging the adequacy

of a union's notice and procedures under *Hudson*. *Abrams*, 59 F.2d at 1378. As the court explained:

> Although an employee's dissent "is not to be presumed," *International Ass'n of Machinists v. Street*, 367 U.S. 740, 774 (1961), this mandate does not control where the class seeks to vindicate its right to notice, directly affecting whether an employee will *become* an "affirmative dissenter." *Compare id.* (finding class inappropriate in suit for injunctive relief against political expenditures and for restitution because all members of proposed class had not "specifically objected to the exaction of dues for political purposes."); *Brotherhood of Ry. & S.S. Clerks v. Allen*, 373 U.S. 113, 119 (1963) (same). In misapplying the holdings in *Street* and *Allen*, the district court committed reversible error.

Id. at 1370 (other citations omitted).

Contrary to United Academics' misrepresentation, *Mitchell* did not address class certification. To be sure, *Mitchell* was certified as a class action. *Mitchell v. Los Angeles Unified Sch. Dist.*, 744 F. Supp. 938, 939-40 (C.D. CAL. 1990). Judgment was entered ordering relief to all class members for a union's and public employer's failure to comply with "the constitutional requirements for the ... collection of agency fees," *Hudson*, 475 U.S. at 310. *Mitchell* ordered restitution of all fees in excess of the nonchargeable portion of dues to all class members, and permanently enjoining seizure of monies in excess of the non-chargeable portion of dues from all nonmembers who—while never manifesting voluntary support for any of a union's activities—might not respond even to a constitutionally-adequate notice under *Hudson*. *Mitchell*, 744 F. Supp. at 944. But the appeal only challenged the permanent injunction. *Id.*, 963 F.2d at 260. Class certification was not an issue.

Thus, *Mitchell* merely reaffirms the proposition that an employee subject to a forced-unionism requirement must, after receiving adequate notice, object in order to avoid paying a fee equal to full union dues, *Allen*, 373 U.S. at 119. United Academics misrepresents *Mitchell* as having some bearing upon a nonmember's entitlement to relief in a case where, as here, a union fails to comply with "the constitutional requirements for the ... collection of agency fees," *Hudson*, 475 U.S. at 310. Opp. at 8-9. But *Hudson*'s pre-seizure notice protections apply to all "potential objectors," 475 U.S. at 306, while *Mitchell* addresses only what happens to "potential objectors" when they have the information necessary to determine whether to object, *i.e.*, when they must decide whether to become actual objectors.

Likewise, United Academics posits numerous self-serving and unproven assumptions about absent class members first alleged in opposition to the professors' class certification motion, and relied upon by the District Court.[2] However, these assump-

---

[2] United Academics would have courts assume the existence of conflicts between the named plaintiffs and absent class members. There is good reason for this desire in terms of legal strategy, as it is settled Circuit law that existence of such conflicts must be proven by the theory's proponent. *Social Services Union Local 535 v. County of Santa Clara*, 609 F.2d 944, 948 (9TH CIR. 1979) (rejecting "purely speculative" theories about male union members in sex discrimination suit pursued by union on behalf of female employees); *cf. Lewis v. Curtis*, 671 F.2d 779, 788 (3D CIR. 1982) (burden is upon defendants to prove inadequacy of representation). United Academics offered not a scintilla of evidence to support its self-serving assertion. Absent class members wanting the relief sought submitted evidence of their support. *See, inter alia*, R. 18, Exhibit C at 40 & Exhibit D at 31-35 (professors' deposition testimony that no colleague criticized actions); Exhibit D, Attachments 4-6 (supportive e-mail correspondence to

(continued...)

tions were irrelevant to the Ninth Circuit's decision. App. B at 16a. None had any bearing on it, no matter their merit as questions to be considered by this Court.[3]

United Academics fails to address the important first question presented in the Petition. Perhaps this explains why the union does not dispute that judgment was entered for the professors, Pet. at 7-9, even though the sole basis for the Ninth Circuit's refusal to review the District Court's class certification decision was its errant notion that "the district court [entered] judgment for the Union on the merits." App. A at 16a.[4]

---

[2] (...continued)
professors' counsel). And, of course, any professor desiring to "opt out" of the relief would retain the right to make voluntary (*i.e.*, absent of the union's threats and coercion) contributions to United Academics.

[3] The District Court relied upon a questionable line of cases mistakenly assuming that a charitable legal aid organization sought to represent absent class members, and the notion that named parties' zealous pursuit of all available relief (their duty under Rule 23) disqualifies them because of speculation that class conflicts might arise because some absent class members might not desire that relief. Those questions are for another day, as—rather than addressing them as presented to it—the Ninth Circuit relied only on its erroneous view of the District Court's judgment.

[4] Even if conflicts existed on a factual record absent here, review would be justified in light of decisions rejecting the District Court's notion that absent class members' opposition to the relief sought defeats class certification. *Horton v. Goose Creek Ind. Sch. Dist.*, 690 F.2d 470, 485-86 (5TH CIR. 1982) (dispute must go to litigation's subject matter); *see also White v. Local 942, LIUNA*, 90 F.R.D. 368, 371-72 (D. AK. 1981) (seeking vindication of statutory rights), *citing Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 n.4 (9TH CIR. 1978).

II. The Court Should Grant *Certiorari* Because a Constitutional Tortfeasor's Post-Suit Promises Are Insufficient to Moot a Case.

The lower courts' mootness rulings regarding the professors' request for declaratory and injunctive relief for each of the union's illegal post-filing demands upon them (App. A at 13a-15a) were premised solely upon faith in United Academics' compliance with *Hudson*, started only after it was sued. United Academics offers no reason why that determination does not conflict with this Court's jurisprudence, and is not in naked defiance of this Court's ruling in *Hudson*. 475 U.S. at 305 n.14. *See also United States v. Generix Drug Corp.*, 461 U.S. 453, 456 n.6 (1983) ("The possibility that [the litigant] may change its mind in the future is sufficient to preclude a finding of mootness"); *see also Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) ("[v]oluntary cessation of challenged conduct moots a case ... only if it is '*absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur.' "); *see also Friends of the Earth v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)) ("It is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.' ").

Instead, United Academics offers a self-serving "wealth of evidence," Opp. at 13-14, of its actions subsequent to being sued and having its illegal actions called to the attention of the District Court. None of that "evidence," however, remotely restricts United Academics' freedom to "return to [its] old ways." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). The union couples this failure with reliance upon boilerplate. Opp. at 12-13. Thus, while this Court's decision in *County of Los Angeles v.*

Davis, 440 U.S. 625, 631 (1979), has bearing insofar as it states the general mootness rule, neither element of that test is met here. As demonstrated in Section III, *infra*, not all of the alleged violations have ceased. Moreover, there is no guarantee that those violations that have ceased will not recur, as United Academics remains the monopoly bargaining representative enforcing a forced-unionism requirement unencumbered by the requested declaratory and injunctive relief.

Moreover, as to absent class members, there is no "interim relief or event" that has "completely and irrevocably eradicated the effects of the alleged violation." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). Under its threats and bluster, United Academics collected forced dues or agency fees from many absent class members.[5] Thus, its claim to have met the standards of *Davis* is baseless.

---

[5] *Hudson* mandates "the constitutional requirements for the Union's collection of agency fees." 475 U.S. at 310. As that language is normally understood, when a union fails to comply with those requirements, it is not entitled to "collect[]" fees. That United Academics collected and retained fees from absent class members demonstrates that it did not "eradicate[] the effects" of its violation. Even under the Ninth Circuit's most-recently expressed view of the appropriate remedial scheme, the absent class members who paid full union dues are entitled to recover at least the nonchargeable portion of the fee. *Prescott v. County of El Dorado*, 177 F.3d 1102, 1109-10 (9TH CIR. 1999), *vacated*, 528 U.S. 1111 (2000), *reinstated in pertinent part*, 204 F.3d 984 (9TH CIR. 2000).

III. The Court Should Grant *Certiorari* Because Discriminatory Treatment Against Those Exercising Constitutional Rights Violates Both Circuit Law and This Court's Jurisprudence.

United Academics opposes the Petition's third question by misrepresenting its own policy, attempting to sow confusion and mask its practice. Opp. at 16-19. While the union denies that it exacts full union dues from nonmembers challenging its fee calculation, giving mere objectors an immediate advance reduction, the Ninth Circuit penetrated this smokescreen, recognizing that United Academics was doing what its notice plainly said. App. A at 11a ("it is true that challengers do not receive a rebate until the dispute is resolved by an impartial decisionmaker").[6] However, it found this practice acceptable under its prior decision in *Grunwald v. San Bernardino City Unified School District*, 994 F.2d 1370, 1374 (9TH CIR. 1993). Thus, that portion of United Academics' argument denying the practice, Opp. at 16-17, misrepresents facts to this Court.

United Academics' Opposition argues that the professors should not prevail on the merits, therefore conceding the serious Circuit splits discussed in the Petition at 23-28. United Academics' argument here—like its argument regarding *Mitchell*—lends support to the professors' arguments, demonstrating how the decision below, App. A at 12a-13a, conflicts with the Ninth Circuit's own decisionmaking in *Grunwald*, where it held that the procedure adopted must "give[] the **objecting employee** the benefit of any imprecision in the calculation process." 994 F.2d

---

[6] That the Ninth Circuit reversed the District Court's misundertanding of the union's procedures is why United Academics cites to only those portions of the Appendix containing the District Court's decision.

at 1374 n.3 (emphasis added). Permitting the impartial decisionmaker to increase the fee upon a nonmember's challenge clearly fails to meet this standard.

CONCLUSION

For the reasons stated above, this petition for a writ of *certiorari* should be ed, and the case set for plenary briefing and argument on the important questions presented herein.

Respectfully submitted,

W. JAMES YOUNG*
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

ATTORNEY FOR PETITIONERS
*Counsel of Record

March 2002